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FEDERAL COMMUNICATIONS COMMISSION

Dennis R. Patrick, Chairman

James H. Quello

Patricia Diaz Dennis

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-26

In the Matter of

Amendment of Section 73.202(b), RM-6031
Table of Allotments,
FM Broadcast Stations.
(Port Sanilac, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 14, 1988; Released: February 16, 1988

By the Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by D. C. Schaberg (petitioner), seeking the allocation of FM Channel 225A to Port Sanilac, Michigan, as that community's first FM broadcast service. Petitioner submitted information in support of the proposal and stated his intention to file an application for the channel.

2. We believe petitioner's proposal warrants consideration. Channel 225A can be allocated to Port Sanilac, Michigan, in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 10 kilometers (6.2 miles) west of the community.[1] The site restriction will prevent a conflict with Station CJBX-FM, Channel 224B, London, Ontario, Canada. Since this allocation is located within 320 kilometers (200 miles) of the common U.S-Canadian border, concurrence of the Canadian government will be required.

3. In view of the fact that the proposed allocation could provide a first broadcast service to Port Sanilac, Michigan, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Port Sanilac, Michigan	---	225A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 8, 1988,** and reply comments on or before **April 25, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

D. C. Schaberg
6250 S. Cedar #12B001
Lansing, Michigan 48911-5715

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should

also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTE

[1] The site restricted coordinates are 43-26-00 and 82-40-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PAN AMERICAN SATELLITE CORPORATION — File No. CSS-84-004-P(LA)-M

Application for Conditional Authority to Construct a Subregional Western Hemisphere Satellite System.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: January 28, 1988; Released: February 16, 1988

By the Commission:

1. The Commission has under consideration the modified application of Pan American Satellite (PanAmSat) seeking conditional authorization to operate six 11/14 GHz transponders on the "Simon Bolivar" satellite for the provision of service between the United States and Western Europe. We placed the application on public notice on December 31, 1986. No comments were filed in response. On October 9, 1987, PanAmSat submitted additional information requested by the Commission.

BACKGROUND

2. On July 25, 1985, the Commission granted PanAmSat conditional authority to construct and operate a subregional Western Hemisphere satellite system.[1] PanAmSat proposed to offer international communications services between the United States and Latin America and dedicated domestic service within South America. The system was to consist of two in-orbit satellites, one primary and one spare of the Hughes HS-393 design, to be located at 57' West Longitude (W.L.) and 45' W.L. Each satellite was to be equipped with 36 transponders: 24 operating at 3.7 - 4.2 GHz and 5.9 - 6.4 GHz for South American transmissions, and 12 operating at 6.4 - 6.9 GHz and 10.7 - 11.2 GHz for U.S. - Latin American communications.

3. The Commission modified this conditional authority on May 16, 1986, to permit PanAmSat to acquire and reconfigure an RCA Astro 3000 Series Satellite (Simon Bolivar) fitted with 18 4/6 GHz transponders and six 11/14 GHz transponders as its initial satellite at the 45' W.L. orbital location.[2] The Commission, however, denied PanAmSat's request to utilize the 11/14 GHz transponders for the provision of service between the United States and Western Europe. The 11/14 GHz transponder frequencies PanAmSat proposed to occupy at the 45' orbital location were originaly assigned to Cygnus Satellite Corporation (Cygnus).[3] PanAmSat planned to sell Cygnus a five percent limited partnership interest in PanAmSat in return for rights to those frequencies. The Commission found that the arrangement contemplated an unauthorized transfer of control under Section 310(d) of the Communications Act and that approval of the plan would contravene Commission policy against the "warehousing" of orbital slots for future use.[4]

4. In a move designed to secure the 11/14 GHz transponders for its proposed service to Western Europe, PanAmSat subsequently applied for consent to the transfer of control of Cygnus. The transfer was approved January 14, 1987.[5] In authorizing the proposed transfer, the Commission noted PanAmSat's statement in its December 24, 1986 request for modification that the proposed use at 45' W.L. of the 11/14 GHz band for the Simon Bolivar satellite would be "in lieu of the use of [11-12/14 GHz] frequencies for which Cygnus was previously authorized . . . "[6] We noted at the same time that our policy precludes PanAmSat from holding authorizations for more than two orbital positions in a given frequency band - - a situation that would exist after consummation of the transfer of control. In response, PanAmSat stated in a letter dated February 19, 1987, that " . . . effective as of the date of consummation of the Cygnus transfer of control, PanAmSat intends to surrender *its conditional authorization* for 57' West Longitude."[7] In two letters dated October 9, 1987, PanAmSat clarified its position, stating in one that " . . . effective with the planned PAS/Cygnus closing, [PanAmSat] would surrender the *57' W. L. orbital position* . . ." and then seek authorization for a hybrid [4/6 GHz and 11-12/14 GHz] satellite at 43' W.L. ". . . by requesting a modification of the present Cygnus [11-12/14 GHz] authorization at 43' and [PanAmSat's 4/6 GHz] authorization presently assigned to 57'."[8]

5. In an order adopted September 28, 1987,[9] the Commission granted PanAmSat final authority to construct, launch and operate the Simon Bolivar satellite for communications between the U.S. and Peru over the five 4/6 GHz transponders. The Commission required PanAmSat to operate its system within the parameters established in the INTELSAT Article XIV(d) consultations completed April 17, 1987,[10] and to comply with the service restrictions set out in the Separate Systems decision.[11]

6. In the instant application, PanAmSat renews its request for conditional authority to operate the six 11/14 GHz transponders at 45' W.L. for the provision of service between the United States and Western Europe. It also seeks waiver of the full-frequency-reuse requirements established in the Commission's Separate Systems decision.[12] PanAmSat states that the design of the RCA Astro 3000 satellite prohibits full frequency reuse in the 11/14 GHz transponders. According to PanAmSat, the potential for redesign of the satellite was very limited. The transponder complement was already in place when it purchased the satellite and, in light of its then scheduled fall 1986 launch date, the only changes PanAmSat could make to the satellite were those related to the precise frequencies of the transponders. PanAmSat claims that it was not possible to affect either the total number of transponders carried or the polarization plan of the satellite.

DISCUSSION

7. In reviewing an application for an international telecommunications satellite system separate from INTELSAT, we must determine whether the proposal is consistent with our Separate Systems decision, whether the applicant possesses the requisite legal, technical and financial qualifications, and whether grant of the request would be in the public interest. We will issue a con-

ditional construction permit to an applicant satisfying these standards. Final operating authority, however, is contingent upon fulfillment of U.S. obligations under Article XIV(d) of the INTELSAT Agreement.

8. In our Separate Systems decision, we established a policy for considering applications for international satellite systems separate from INTELSAT. We found that separate systems would stimulate technological innovation and service development, improve network efficiencies, reduce user costs and create new business and trade opportunities. We concluded that separate systems will enable users with special communications needs to meet those needs with new methods for packaging and transmitting information.

9. We concluded in our Separate Systems decision that restrictions were necessary to provide reasonable assurance that the entry of these systems would not cause significant economic harm to INTELSAT. Under these service limitations, separate systems are restricted to providing services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with public switched networks (except for emergency restoration service). The service limitations protect INTELSAT's core revenues, which are obtained from supplying space segment capacity for international switched message services.

10. We have previously found that separate systems proposing to operate within the confines of the service limitations will not cause significant economic harm to INTELSAT.[13] PanAmSat's proposed 11/14 GHz system complies with the service limitations we imposed in our Separate Systems decision. PanAmSat will offer its service to customers on a non-common carrier basis either by sale or long-term lease. PanAmSat's system will not interconnect with the public switched network. Its contracts for purchase of transponders and its lease agreements will include the restriction against interconnection. As a result, a finding that PanAmSat's proposed 11/14 GHz system does not cause significant economic harm to INTELSAT is consistent with the conclusions we have reached in previous separate system authorization orders.[14]

11. Further, as in our previous decisions, we find that authorizing PanAmSat's proposed system will provide benefits to users. PanAmSat will be able to make tailored and flexible arrangements with customers to provide systems specifically designed to meet its customers needs, and to offer new and innovative satellite technology. By selling and leasing its space segment capacity on a non-tariffed basis, PanAmSat will offer its customers the ability to make long-term plans for the use of facilities and reduced user costs. It will offer customers who purchase capacity the added benefit of financial investments. Also, PanAmSat can provide combinations of satellite downlink power, coverage and connectivity which INTELSAT cannot provide. These factors combine to enhance user control and security and work to keep costs reasonable.

12. We have already found that PanAmSat possesses the necessary legal qualifications to be a Commission licensee. In addition, in authorizing PanAmSat to operate five 4/6 GHz transponders over its proposed system, we found that PanAmSat had sufficient non-contingent funds to cover the costs of construction, launch and first year operation of the Simon Bolivar Satellite.[15] Accordingly, PanAmSat has already satisfied the financial requirements established in our Separate Systems decisions.

13. As for technical considerations, we also have already found that PanAmSat's proposed 11/14 GHz facility can be operated without causing undue interference to any other satellite systems.[16] We continue to retain jurisdiction to impose operational constraints on an operator's system as necessary. In addition, we accept PanAmSat's request to terminate its assignment at 57' W.L. However, upon consummation of its agreement to acquire control of Cygnus, PanAmSat will hold authorizations for a hybrid satellite at 45' W.L., an 11/14 GHz satellite at 43' W.L., and a hybrid satellite with, in effect, no specified orbital position. This arrangement is unacceptable. While PanAmSat indicates in its letters that it wishes to seek authority to locate its second, previously authorized satellite at 43' W.L., it must submit an application to do so. We could, within the policies established in the Separate Systems decision, summarily decide to change the temporary orbital assigments made to PanAmSat. We will not take this step now. Instead, we will accept PanAmSat's request to terminate its assignment to 57' W.L. and will give PanAmSat thirty days to file an application for modification with the Commission detailing its preferred orbital assignments and clarifying its plans for a second space station facility. It should be clear from the face of the application that PanAmSat expects to hold no more than two authorizations for a hybrid satellite, or no more than two authorizations for a space station in any frequency band.

14. Finally, in our Modification Order, we declined to rule on PanAmSat's original request for a waiver of the full-frequency-reuse requirments established in the Separate Systems decision. However, we stated that we would view a waiver favorably as long as the non-compliant satellite is making some use of the orbit/spectrum resource which otherwise would not be used, and as long as such use does not preclude the use of the resource by a satellite which does meet our full frequency reuse requirements.[17] We find that grant of PanAmSat's request for waiver of the reuse requirements is appropriate under the circumstances. Operation of the Simon Bolivar's 11/14 GHz transponders would put to use otherwise idle orbital/spectrum resource. Moreover, PanAmSat has shown that it was unable to redesign the communications system of the RCA Astro 3000 satellite since the transponder complement was already in existence when it purchased the satellite. Grant of the waiver, however, is conditional. Should the Commission find that another satellite facility operating on the subject frequencies would be able to meet the full-frequency-reuse requirements, and that such operation would be incompatible with the operation of the Simon Bolivar satellite, PanAmSat will be required to cease operation on those frequencies.[18]

CONCLUSION

15. We find that PanAmSat's application is consistent with the service restrictions we set out in our Separate Systems decision. Further, we conclude that PanAmSat is legally, financially and technically qualified under Title III of the Communications Act and the Separate Systems decision to provide international satellite services. We also find that grant of PanAmSat's application would be consistent with the public interest, convenience and necessity under Section 309(a) of the Communications Act of 1934.

16. Accordingly, IT IS ORDERED pursuant to Sections 4(i) and (j), 308, 309 and 319 of the Communications Act of 1934, as amended, 47 U.S.C §§ 4(i) and (j), 308, 309

and 319, that the modified application filed by Pan American Satellite, File No. CSS-84-004-P(LA)-M, IS GRANTED and Pan American Satellite IS CONDITIONALLY AUTHORIZED to operate the six 11/14 GHz transponders on the Simon Bolivar satellite for the purpose of providing services between the United States and Western Europe, subject to the terms and conditions set forth below and the final instruments of authorization to be issued upon completion of the procedures set forth in paragraph 17 below.

17. IT IS FURTHER ORDERED that final authority for operation of these transponders shall not be issued unless and until: 1) one or more foreign authorities authorizes use of the system and enters into consultation procedures with the United States under Article XIV(d) of the INTELSAT Agreement to ensure technical compatibility and to avoid significant economic harm; and 2) the Department of State informs the Commission that the United States has fulfilled its Article XIV(d) obligations and that the Commission may proceed with the final authorization of the proposed system.

18. IT IS FURTHER ORDERED that the operation of the six 11/14 GHz transponders is limited to the provision of services through the sale or long-term lease of transponders or space segment capacity for communications not interconnected with the public switched network (except for emergency restoration service).

19. IT IS FURTHER ORDERED that Pan American Satellite is temporarily assigned the orbital location at 45 degrees West Longitude for operation of the six 11/14 GHz transponders on the Simon Bolivar satellite.

20. IT IS FURTHER ORDERED that the Commission will retain jurisdiction over the use of all space segment within the proposed system to ensure compliance with the service restrictions stated above.

21. IT IS FURTHER ORDERED that Pan American Satellite shall file with the Commission no later than one year from the release date of this conditional authorization information showing that it is making all reasonable efforts toward obtaining foreign approval to provide services via its proposed 11/14 GHz system.

22. IT IS FURTHER ORDERED that Pan American Satellite's request for a waiver of the full-frequency-reuse requirements IS GRANTED subject to the condition that PanAmSat shall be required to cease operation of its six 11/14 GHz transponders if the Commission finds that operation of another satellite facility complying with the full-frequency-reuse requirements would be incompatible with the operation of the Simon Bolivar satellite on these frequencies.

23. IT IS FURTHER ORDERED that this authorization will become effective upon consummation of the transfer of control of Cygnus Satellite Corporation to Pan American Satellite Corporation as previously authorized by the Commission.

24. IT IS FURTHER ORDERED that Pan American Satellite shall, within 30 days of the release of this order, make an application for modification to the Commission detailing its preferred orbital assignments and clarifying its plans for a second space station facility.

25. IT IS FURTHER ORDERED that the temporary assignment of any orbital locations to Pan American Satellite is subject to change by summary order of the Commission on 30 days notice and does not confer any permanent right of use of the orbit or spectrum. Such a change may be ordered, *inter alia*, in the event the national security or the public interest so requires, or to implement any of the objectives or policies set forth in the Separate Systems Decision, 101 F.C.C. 2d 1046 (1985). Neither this authorization nor any right granted by this authorization shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any entity, corporate or otherwise, to any person except upon application to the Commission.

26. IT IS FURTHER ORDERED that Pan American Satellite must file with the Commission copies of any operating agreements entered into within 30 days of execution.

27. IT IS FURTHER ORDERED that Pan American Satellite must comply with the Report and Order adopted in the Separate Systems Decision, 101 F.C.C. 2d 1046 (1985), as amended in the reconsideration orders, FCC 84-144 (released April 17, 1986) and FCC 86-471 (released October 31, 1986).

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] Pan American Satellite Corporation, 101 F.C.C. 2d 1318 (1985) (hereinafter Initial Authorization).

[2] Pan American Satellite Corporation, FCC 86-257 (released May 21, 1986) (hereinafter Modification Order).

[3] *See* Cygnus Satellite Corporation, File No. CSS-84-002-P(LA), FCC 85-403, released September 3, 1985; *modified* Mimeo No. 0262, October 22, 1985.

[4] Under this policy, an entity is prohibited from holding authorizations for more than two orbital positions in a given frequency band.

[5] Pan American Satellite Corporation, DA 87-53 (released January 20, 1987).

[6] *See* Application of Pan American Satellite Corporation, File No. CSS-84-004-P(LA), filed December 24, 1986. *See* Letter from Counsel for Pan American Satellite, to the Commission dated February 19, 1987.

[8] *See* Letters from Counsel for Pan American Satellite, to the Commission dated October 9, 1987.

[9] Pan American Satellite, FCC 87-310 (released September 30, 1987).

[10] *See* INTELSAT Assembly of Parties Record of the Eleventh (Extraordinary) Meeting, Attachment No. 1 to AP-11-10E "Report by the Board of Governors to the Eleventh Assembly of Parties Pursuant to Article XIV(d) on the PanAmSat Network" (February 1987).

[11] *See* Establishment of Satellite Systems Providing International Communications (Separate Systems decision), 101 F.C.C. 2d 1046 (1985); *recon.* 51 Fed. Reg. 17631 (May 14, 1986) (summary only); *further recon.* FCC 86-471 (released October 31, 1986).

[12] The Commission adopted certain standards to ensure efficient use of the orbit/spectrum resource. Specifically, it was required that: 1) each space station of a separate international system be equipped with transponders capable of using at least 860 MHz of each 1000 MHz assignment in any band; 2) satellite operators

employ polarization discrimination in order to reuse both the uplink and downlink frequency bands; and 3) satellites serving widely separated geographic areas be configured so that all frequencies and both polarizations can be reused in all beams.

[13] Pan American Satellite Corporation, Initial Authorization *supra* note 1; Pan American Satellite Corporation, Modification Order, *supra* note 2; International Satellite, Inc. 101 F.C.C. 2d 1201 (1985); Orion Satellite Corporation, 101 F.C.C. 2d 1302 (1985), and unpublished order, File No. CSS-83-002-P, (released September 6, 1985); Cygnus Satellite Corporation, *supra* note 3, and unpublished order (released October 22, 1985); Financial Satellite Corporation, FCC 86-14 (released January 15, 1986) (unpub.); Columbia Communications Corporation, FCC 86-536, File No. CSS-86-002(LA) (released December 16, 1986).

[14] Our opinion with regard to economic harm is not a substitute for the INTELSAT consultation process. PanAmSat's 11/14 GHz system must undergo Article XIV(d) scrutiny on the issues of economic harm and technical compatibility.

[15] *See* Pan American Satellite, FCC 87-310 (released September 30, 1987).

[16] Modification Order, *supra* note 2, para. 47.

[17] Modification Order, *supra* note 2, para. 41.

[18] We have decided to grant PanAmSat a waiver of the full-frequency-reuse requirements conditioned on these terms rather than a special temporary authorization as we have done in other cases. *See* Systematics General Corporation, 2 FCC Rcd 5406 (released August 31, 1987); Systematics General Corporation, DA 87-1699 (adopted November 19, 1987). In reaching this decision we have taken into account the fact that the separate systems industry is not established and that a waiver would serve as a means of encouraging industry growth and avoiding adverse effects on marketing efforts.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-9

In re Applications of

DENNIS H. CURLEY (hereafter Curley)	File No. BPH-860506NA
BRUCE S.& RUTHANNE F. HAMLIN d/b/a COASTAL RADIO (hereafter Coastal)	File No. BPH-860507PV
PEGGY LEE TALLYN (hereafter Tallyn)	File No. BPH-860507PW
KIRKLEY PAIGE BEAL (hereafter Beal)	File No. BPH-860507PX
LIGHTS COMMUNICATION CORPORATION (hereafter Lights)	File No. BPH-860507PY
DEBORAH MARIE BROOKS (hereafter Brooks)	File No. BPH-860502ME (DISMISSED)

For a Construction Permit
for a New FM Station on Channel 238A
in Topsham, *Maine*

HEARING DESIGNATION ORDER

Adopted: January 19, 1988; Released: February 16, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters*. The instant application filed by Brooks (Petitioner) was returned on April 30, 1987 by the Chief, FM Branch because of a discrepancy between the geographic coordinates specified in the application and those plotted on the 15 minute topographic map.[1] A petition was filed on June 1, 1987 requesting: (i) reconsideration of the Chief's action; (ii) acceptance of a curative amendment and (iii) *nunc pro tunc* reinstatement of Brooks' application, as amended.

3. In support of these requests the petitioner raises two claims. First, Brooks argues that in preparation of the instant proposal she obtained the coordinates of an existing tower currently used by Mr. William Messier in connection with his paging service, because she proposed to locate her transmitter near that of Mr. Messier's. However, the geographic coordinates specified in Mr. Messier's license and in the Commission's files do not accurately reflect the physical location of Messier's tower. Brooks claims that this erroneous information *caused* the discrepancy between the coordinates specified in her application and those plotted on her map. (petition p.4, para. 6)

4. Upon careful consideration of this argument, we find that while Brooks may have relied on inaccurate information to select the position of her transmitter, her reliance thereon does not explain her failure to specify coordinates in her application that correlate with those plotted on her topographic map. Petitioner's engineering data, and therefore her application, is in conflict with *itself*. Messier's coordinates, incorrect or otherwise, do not appear to have contributed to the discrepancy in any way. Brooks' proposed site is *near* that of Messier's, but is *not* co-located therewith. Brooks has failed to establish a causal connection between her reliance upon the coordinates of a *nearby* existing tower and the inconsistent data presented in her application for a separate site altogether. In sum, we find no relationship between the error in Messier's license or the Commission's files and the conflicting data in Petitioner's application. Consequently, we reject this argument as specious and unsupported by the instant circumstances.

5. Second, Brooks argues that she did not have adequate notice of the Commission's "new" requirements for FM transmitter site maps because the instant application was filed prior to the effective date of *FM Transmitter Site Map Submission Required by FCC Forms 301 and 340*, 1 FCC Rcd 381 (1986). Therein, the Commission reiterated its requirements contained in *Public Notice*, Mimeo 3693, rel. April 5, 1985, as incorporated by reference in the *Report & Order* in Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985). Moreover, the Commission found that the *Public Notice*, *supra*, had not been properly published in the *Federal Register* and directed the staff to reinst- ate those applicants whose applications had been returned for failure to comply with the topographic site map requirements, who had preserved their rights on appeal, to afford them one opportunity to cure the defect.

6. Pursuant to the Commission's Order in this document, Petitioner claims to be an applicant who was returned for a transmitter site map defect at the tenderability stage of processing, and, as such, entitled to re- instatement *nunc pro tunc*.

7. Petitioner's reliance upon the above-referenced *Memorandum Opinion and Order* is wholly misplaced. The subject application was not returned because of a defective transmitter site map, (a tenderability defect), but because the geographic coordinates in the application did not match the site plotted on the map (an acceptability defect).

8. By its terms, the above *Order* solely contemplates applications which were returned for failure to comply with the *Public Notice*, *supra*, wherein threshold requirements for a site map capable of passing tenderability review were set forth.[2] (e.g. size, legibility, and labeling requirements). The subject application satisfied the requirements for tender, but was returned at the acceptability stage. Thus, Petitioner may not seek to avail itself of a

remedy fashioned for applicants returned at the tenderability stage. Accordingly, this argument is summarily rejected.

9. A timely-filed curative amendment, going to the acceptabilty of Brooks' application should have been filed by June 23, 1986, thirty days after Brooks' application appeared on a notice of tenderability. Brooks filed its amendment on April 30, 1987. Clearly, this amendment is untimely and, as such, unacceptable.

10. In view of the foregoing, the petition for reconsideration filed by Brooks is hereby DENIED and the application is DISMISSED.[3]

11. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any compara- tive advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Curley	July 21, 1986
Beal	April 10,1987; October 1, 1986; August 21, 1986

12. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

13. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Lights would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

14. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

15. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by Lights would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a compara- tive basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

16. IT IS FURTHER ORDERED, That the petition for reconsideration filed by Brooks IS DENIED and the application, file number BPH-860502ME, is HEREBY DISMISSED.

17. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amend- ments ARE ACCEPTED to the extent indicated herein: Curley, Beal.

18. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

19. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **March 8, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

21. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] In its cover letter to the original application, Brooks stated that a 7.5 minute map for the site location was not available.

[2] At the tenderability review stage, the Commission employs its "hard look" approach and examines the application to determine whether information critical to processing is present. The accuracy of this information is evaluated at the acceptability stage.

[3] In order to better utilize the Bureau's limited processing staff resources, the Commission has approved staff consideration and disposition of tenderability and acceptability matters in the context of the relevant hearing designation order rather than in a separate action document. *Teton Broadcasting*, 1 FCC Rcd 518, 521 n.5 (1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-18

In re Applications of

EDWARD M. MODLIN, JR. (hereafter: Modlin)	File No. BPH-851210MG
RADIOX, INC. (hereafter: Radiox)	File No. BPH-851231MK
SANDRA RAE ROBERTSON tr / as ROBERTSON BROADCASTING COMPANY (hereafter: Robertson)	File No. BPH-860102MJ
HARTKE COMMUNICATIONS CORP. (hereafter: Hartke)	File No. BPH-860102MK
BLUE MOUNTAIN BROADCASTING (hereafter: Mountain)	File No. BPH-860102ML
PMK PARTNERS I (hereafter: PMK)	File No. BPH-860102MN
GENESIS COMMUNICATIONS, INCORPORATED and JUDITH L. RANDOLPH (hereafter: Genesis)	File No. BPH-860122NB

For Construction Permit
for a New FM Station
on Channel 221A
in Ruckersville, Virginia

HEARING DESIGNATION ORDER

Adopted: January 26, 1988; Released: February 16, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

PRELIMINARY MATTERS

2. It should be noted that due to the late tenderability period opened on September 15, 1987 by applicant Genesis, various amendments filed by the competing applicants, which otherwise would have been late-filed, will be considered filed as of right, and therefore will be afforded full comparative advantage. *See Memorandum Opinion and Order*, reconsideration in Docket 84-750, 50 Fed. Reg. 43157 (1985).

INDIVIDUAL APPLICANTS

3. *Radiox.* Item 8(b) of Section II on FCC Form 301 asks whether any immediate family member of a party to the application has any connection with another broadcast station or pending broadcast application. Radiox responded negatively to this question. However, the applicant has stated that Joseph Kirk, a party to the application, is the father of Steven and Randal Kirk, who are also parties to the application. In an amendment filed on May 22, 1986, the applicant reported that Randal Kirk had become an applicant for a new FM facility in Jackson, Virginia. In light of this development, Radiox should have amended its response to Item 8(b) and the accompanying exhibit. Therefore, Radiox will be ordered to file an amendment within 30 days with the presiding Administrative Law Judge updating its application with respect to all broadcast interests held by the immediate family members of parties to the application.

OTHER MATTERS

4. *Reporting.* 47 C.F.R. § 1.65 requires applicants to timely amend their applications so as to keep them substantially complete and accurate with respect to broadcast interests acquired subsequent to the initial filing. Staff review of the Commission's ownership files has revealed that applicants Hartke and Genesis have been remiss in their obligation under 47 C.F.R. § 1.65.[1] Therefore, Hartke and Genesis will be ordered to file amendments within 30 days with the presiding Administrative Law Judge updating their applications with respect to all broadcast interests, or an appropriate issue will be specified by the Judge.

5. Furthermore, because of their proximity to Ruckersville, the unreported applications filed by Genesis in Bridgewater, Virginia, and Charlottesville, Virginia were both found to be in violation of the Commission's duopoly rule under 47 C.F.R. § 73.3555(a)(2), and hence, were also found to be in violation of the Commission's proscription against the filing of inconsistent or conflicting applications under 47 C.F.R. § 73.3518. Accordingly, issues will be specified to determine whether Genesis failed to update its application to disclose later filed inconsistent applications, whether such non-disclosure amounted to misrepresentation or an attempt to mislead the Commission, and the effect of the non-disclosure on Genesis' qualifications to be a Commission licensee.

6. *EEO.* Where applicants for a new broadcast station propose to employ five or more full-time employees, 47 C.F.R. § 73.2080 requires those applicants to submit equal employment opportunity (EEO) programs with their applications. Section VI of FCC form 301 specifies the use of a five-point format set out in FCC form 396A. In their applications, Modlin, Radiox, and Robertson state that they will employ five or more full-time employees. However, while each has submitted an EEO program, each of

these programs was deficient to some degree with respect to Part IV, the recruitment section. Modlin, Radiox, and Robertson failed to include, within Part IV, adequate examples of minority organizations, women's organizations, and employment services, which will be used to effectuate the EEO programs. In addition, Radiox failed to include within Part IV, adequate examples of area schools and publications which will be used to effectuate its program. Accordingly, these applicants will be required to file amended EEO programs with the presiding Administrative Law Judge within 30 days of the release of this Order, or an appropriate issue will be specified by the Judge.

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by Hartke would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

9. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1 (a). To determine, the facts and circumstances surrounding Genesis' failure to timely update its application, and whether Genesis violated 47 C.F.R. § 1.65

(b). To determine, in light of the facts adduced pursuant to issue (a) above, whether Genesis misrepresented facts to, or concealed information from, or attempted to mislead the Commission.

(c). To determine, in light of the facts adduced pursuant to issues (a) and (b) above, whether Genesis possesses the basic qualifications to be a licensee of the facilities sought here.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by Hartke would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

11. IT IS FURTHER ORDERED, That Radiox shall be ordered to file an amendment within 30 days with the presiding Administrative Law Judge updating its application with respect to all broadcast interests held by the immediate family members of parties to the application.

12. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Hartke and Genesis shall submit amendments to the presiding Administrative Law Judge updating their broadcast interests.

13. IT IS FURTHER ORDERED, That Modlin, Radiox, and Robertson shall file amended EEO programs with the presiding Administrative Law Judge within 30 days of the release of this Order.

14. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

15. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

16. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **March 8, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] Commission records reveal that since the filing of this application, Hartke has acquired an attributable interest in applications for four new FM facilities. These applications are located in Christiansburg, Virginia (File No. BPH-860203MI); Rockledge, Florida (File No. BPH-861103MA); Goodlettsville, Tennessee (File No. BPH-861217MX); and Ocean Pines, Maryland (File No. BPH-870331PB). Similarly, Genesis has acquired an interest in three new FM applications in Bridgewater, Virginia (File No. BPH-860317NF); Ocean Pines, Maryland (File No. Bph-870331MI); and Charlottesville, Virginia (File No. BPH-870430MI).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-19

In re Applications of

LLOYD SPIVEY (hereafter Spivey)	File No. BPH-870310KA
(Charles Black and Mary Alice Black d/b/a) BEAVER DAM BROADCASTING COMPANY	File No. BPH-870312MA
MICHAEL BRENT FERGUSON	File No. BPH-870312MD

For Construction Permit
for New FM Station in
Beaver Dam, Kentucky
Channel 274A (102.7 MHz)

HEARING DESIGNATION ORDER

Adopted: January 27, 1988; Released: February 16, 1988

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Spivey*. Spivey has indicated in Exhibit No. 1 of his application that he is currently the General Manager of Radio Stations WLLS AM/FM in Hartford, Kentucky. Since the transmitters of the proposed Beaver Dam station and the existing Hartford FM station are approximately 6.3 miles apart, any managerial capacity may violate the Commission's cross-interest policy. *See , e. g., Martin Lake Broadcasting Company*, 21 FCC 2d 180, 181-182 (1970). Accordingly, an appropriate issue will be specified.

3. *Other Matters*. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to Spivey, whether the involve- ment of the applicant with stations WLLS AM/FM (Hartford, Kentucky) is consistent with the Commission's cross- interest policy and, if not, whether a grant of the application would be in the public interest.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in the light of the evidence adduced pursuant to the specified issue, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

7. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **March 8, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-20

In re Applications of

THERESA P. PARRISH (hereafter Parrish) File No. BPH-860703MN

ELAINE B. FIRESTONE D/B/A SADDLEBUNCH RADIO COMPANY (hereafter Saddlebunch) File No. BPH-860707NI

DON H. BARDEN (hereafter Barden) File No. BPH-860707NT

For a Construction Permit
For a New FM Station on Channel 275A,
Summerland Key, Florida

HEARING DESIGNATION ORDER

Adopted: January 27, 1988; Released: February 16, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. In response to Section VI, FCC Form 301, the applicant below has indicated that it will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. The EEO program submitted by the following applicant is incomplete or is otherwise deficient in the manner described below. Accordingly, the applicant listed below will be required to file an amended EEO program with the presiding Administrative Law Judge within 30 days of the release of this Order.

APPLICANT	DEFICIENCIES
Saddlebunch	Failed to identify specific sources of recruitment specializing in women and minority candidates; failed to identify publications it will utilize in attracting women and minority candidates; also failed to identify educational institutions with substantial women and minority enrollments from which the applicant intends to recruit employees.

3. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Parrish	September 16, 1987
Barden	April 30, 1987; August 14, 1987; August 25, 1987; September 16, 1987; September 25, 1987; October 27, 1987; December 23, 1987; January 11, 1988; January 14, 1988

4. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant shall submit Section VI information in accordance with the requirement of 47 C.F.R. § 73.2080(c) to the presiding Administrative Law Judge: Saddlebunch.

8. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Parrish, Barden.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief,

Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than **March 8, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-10

In re Applications of

ROCKLEDGE COMMUNITY BROADCASTERS, INC. (hereafter Rockledge)	File No. BPH-851206MH
RUTLAND COMMUNITY BROADCASTING, INC. (hereafter Community)	File No. BPH-851209MA
EDWARD G. PICKETT AND CAROL L. PICKETT,) A GENERAL PARTNERSHIP (hereafter Pickett)	File No. BPH-851209MB
GARY KENNY (hereafter Kenny)	File No. BPH-851209ML

For Construction Permit
for a New FM Station on Channel 233A
in Rutland, Vermont

HEARING DESIGNATION ORDER

Adopted: January 25, 1988; Released: February 16, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Kenny*. On April 25, 1986, Rockledge filed a petition to deny the Kenny application. In the engineering statement appended to its petition, Rockledge asserts that the area encompassed by the Kenny 1 mV/m contour is "grossly overstated", and that at Kenny's specified center of radiation, the distances to the Kenny 1 mV/m contour would be less than predicted for a class A facility. Rockledge also contends Kenny's coverage map does not clearly show the location of the community of Rutland and that Kenny's environmental statement does not comply with the requirements of former 47 C.F.R. § 1.1305 of the Rules.

3. We hold that Rockledge's petition to deny is in all respects except as specifically discussed below the equivalent of a petition to specify issues before designation and as such will receive no consideration in this Hearing Designation Order. *Fresh Air, Inc., Hearing Designation Order* in BC Docket Nos. 82-543 and 82-544 (Broadcast Facilities Div., August 6, 1982). *See Revised Procedures for the Processing of Contested Broadcasting Applications*, 72 FCC 2d 202 (1979).

4. Concerning Kenny's antenna center of radiation above mean sea level (AMSL), Rocklege states the average terrain, as calculated using the NGDC database, is 1167 feet AMSL, while Kenny shows the center of radiation at 1488 feet AMSL, "only" 321 feet above the average terrain. It is thus the position of Rockledge that the center of radiation placed at 321 feet HAAT would produce distances to the 1 mV/m contour that would be less than predicted for a Class A facility.

5. Where terrain data is in dispute, we do not simply rely on NGDC database figures, as Rockledge suggests. Moreover, our database HAAT figures are consistent with the applicant's. Also, although there is a 7 feet discrepancy in the HAAT, this error has no effect on the acceptability of Kenny's application which complies with all of our acceptance requirements. Accordingly, we will reject Rockledge's request to dismiss Kenny's application but require that Kenny shall amend his application by submitting the correct HAAT calculation with the presiding Administrative Law Judge.

6. *Rockledge*. In Section V-B, Item 15, Exhibit E-6B, applicant reversed the predicted distances to the 60 dBu contour along its 135 and 180 degree radials. On March 24, 1986, the application was returned as unacceptable for filing. However, in Exhibit E-4C Rockledge correctly plotted the 60 dBu contour along the radials in question. Accordingly, Rockledge's petition for reconsideration and reinstatement *nunc pro tunc* was granted by letter dated August 14, 1987. However, Rockledge shall amend its application to provide a corrected Exhibit E-6B.

7. The applicant below has petitioned for leave to amend its application on the date shown. The accompanying amendment was filed after January 17, 1986, the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendment is accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendment will be disallowed.

APPLICANTS:	DATE:
Pickett	1/27/86

8. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in the light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That the Rockledge petition to deny IS HEREBY DENIED to the extent indicated above.

11. IT IS FURTHER ORDERED, That Kenny shall amend his application as specified in Paragraph 5, above, with the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That Rockledge shall amend its application as specified in paragraph 6, above, by filing the correct tabulations with the presiding Administrative Law Judge within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein: Pickett

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **March 8, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-17

In re Applications of

DONALD E. HILGENDORF (hereafter Hilgendorf) — File No. BPH-861020TA

TRAN BROADCASTING CORPORATION INCORPORATED (hereafter Tran) — File No. BPH-861020TB

RANDALL H. BUCHWALD, ET. AL., d/b/a NEW MEDIA ENTERPRISES (hereafter "New Media) — File No. BPH-861020TE [DISMISSED]

For Construction Permit for
New FM Station, Channel 295A, 106.9 MHz
Brookfield, Wisconsin

HEARING DESIGNATION ORDER

Adopted: January 26, 1988; Released: February 16, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Hilgendorf.* On February 2, 1987 Hilgendorf filed an amendment correcting its response to Items 6 and 7, Section V-B, center of radiation above mean sea level (347.9 meters instead of 217 meters) and Section V-B, Question 7 regarding the use of a directional antenna, (yes instead of no) to FCC Form 301. These discrepancies in Hilgendorf's application, as originally filed, do not render it unacceptable for filing since the correct information can be "confidently and reliably" derived utilizing the information contained in the tower sketch (Figure 1) of the application. Furthermore, the February 2, 1987 amendment would ordinarily be denied as untimely.[1] In the interest of administrative efficiency, we will accept Hilgendorf's amendment. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore any comparative advantage resulting from the amendment will be disallowed.

3. *Tran.* The applicant Tran, out of an abundance of caution, has requested waiver of 47 C.F.R. § 73.315(a) which requires the 70 dBu contour to encompass the entire city of license. The staff has determined that the waiver request is unneccessary and it will be dismissed as moot.

4. *New Media.* Engineering analysis of New Media's application reveals a short-spacing of 1.3 kilometers between the applicant's proposed facilities and existing station WMUS(FM), Muskegon, Michigan. The required separation in this instance is 163 kilometers, whereas New Media has proposed a site which is 161.7 kilometers. In *Kenter Broadcasting Company*, FCC 86-269, released June 12, 1986 *aff' d per curiam*, Case No. 86-1399 (D.C. Cir. 1987) the Commission found that it "[has] not discovered any case in which [it has] excused an applicant requesting a short-spacing waiver from making a threshold showing[2] when the short-spacing was more than one mile or 1.6 kilometers. Nor [does it] think that it would be appropriate to invoke the *de minimis* exception in any case, were one to arise where an applicant proposed to be short-spaced by more than one mile or 1.6 kilometers, and does not make the threshold showing" (footnote added). Since the short-spacing involved here is greater than 1.6 kilometers, it is not *de minimis*.

5. Finally, and most importantly, New Media failed to timely request a waiver of 47 C.F.R. § 73.207, the minimum mileage separation requirement. 47 C.F.R. § 73.3566(a) states, in pertinent part, that applications "patently not in accordance with FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for a waiver will not be accepted for filing or if inadvertently accepted for filing will be dismissed." Thus, New Media's application must be dismissed as inadvertently accepted for filing because it is not in compliance with the spacing rules and it failed to include a request for waiver of these rules. *See Donovan Burke* 60 RR 2d 110 (1986).[3]

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That Hilgendorf's February 2, 1987 amendment IS ACCEPTED to the extent indicated herein.

10. IT IS FURTHER ORDERED, That Tran's request for waiver of 47 C.F.R. § 73.315(a) IS DISMISSED AS MOOT.

11. IT IS FURTHER ORDERED, That New Media's application IS DISMISSED AS INADVERTENTLY ACCEPTED FOR FILING.

12. IT IS FURTHER ORDERED, That the petition to deny filed by Hilgendorf against New Media IS DISMISSED AS MOOT.

13. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

14. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than **March 8, 1988,** file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

15. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (1985), provided that an applicant could not file an amendment to its application more than 30 days after the placement of the application on a public notice of tenderability. Hilgendorf was placed on such a public notice on November 13, 1986.

[2] The threshold showing is a showing of no available fully spaced site, and that the applicant demonstrates that the public interest will be served despite the minor deviation from the Commission's spacing rule.

[3] On November 5, 1987, Hilgendorf filed a petition to deny New Media, to which New Media has filed an opposition and Hilgendorf a reply. In light of the above action, the petition to deny will be dismissed as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Request of

The Detroit News, Inc.,
Licensee of Television Station WUSA,
Washington, D.C.

for

Declaratory Ruling

STAFF RULING

Adopted: February 3, 1988; Released: February 16, 1988

By the Chief, Fairness/Political Programming Branch:

1. The Commission has before it a request for declaratory ruling filed on December 16, 1987, by The Detroit News, Inc., licensee of television station WUSA, Washington, D.C., seeking Commission declaration that news interview segments on two programs, "Capital Edition" and "22:26," are exempt from equal opportunities as "bona fide news interviews" under Section 315(a)(2) of the Communications Act of 1934, as amended.

2. WUSA states that it produces and controls both programs, and that they are regularly scheduled for broadcast on a weekly basis. WUSA describes "Capital Edition" as a 60-minute local news and information program hosted by John Goldsmith, carried on Sundays at 10:30 a.m., and repeated at 11:30 p.m. According to petitioner, the program was initiated in 1984, and presents "profiles and portraits of issues, people, and places that impact the Washington metropolitan area," as well as entertainment segments. In the past, interviewed guests have included Sen. Albert Gore, Rep. Tom McMillen, and former Secretary of State Edmund Muskie. WUSA represents that "22:26" was initiated in 1986, and is moderated by Maureen Bunyan. The half-hour program airs on Sunday mornings at 11:30, and each segment "explores a single news issue of importance to Channel 9's viewing audience." According to WUSA, appearances or profiles of political figures have included D.C. Mayor Marion Barry and Sen. Barbara Mikulski.

3. WUSA contends that the news interview segments of "Capital Edition" and "22:26" meet the criteria for a news interview exemption under Section 315(a)(2) of the Communications Act. As such, WUSA maintains that any candidate interviewed on these segments should not be subject to equal opportunities.

DISCUSSION

4. Section 315 of the Communications Act provides that if a licensee permits a legally qualified candidate for public office to "use" a broadcasting station (an appearance by picture or voice), it must afford equal opportunities to other such candidates for that office. In 1959, Congress amended Section 315 to exempt four categories of news programming from the equal opportunities requirements:

(1) bona fide newscast;

(2) bona fide news interview;

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary); or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto).

47 U.S.C. Section 315(a). In determining whether a program falls within the "bona fide news interview" exemption, the Commission considers whether it is regularly scheduled, whether the broadcaster controls the program, and whether the broadcaster's decisions on the format, content and participants are based on its reasonable, good faith journalistic judgment and newsworthiness rather than on an intention to advance any individual's candidacy. *See U. S. News and World Report, L. P.*, 2 FCC Rcd. 7101 (1987).

5. Within this framework, and based on the information WUSA has provided, it appears that the news interview segments of both "Capital Edition" and "22:26" are exempt from equal opportunities as bona fide news interviews under Section 315(a)(2). Both programs are regularly scheduled. *See Aspen Institute*, 55 FCC 2d 697, 709 (1975). Further, the licensee asserts that it produces and controls both programs, and that all decisions as to format, editing, content and participants are made by WUSA personnel, based on good faith journalistic judgment and newsworthiness, and not on an intention to benefit any particular candidate. While petitioner states that "Capital Edition," unlike "22:26," also includes entertainment features, this does not preclude the regularly scheduled news interview segments from exempt status. *See Multimedia Entertainment, Inc.*, 56 RR 2d 143 (1984). In any event, we are ruling only on the news interview segments of each program, and therefore make no disposition on any of the other features.

6. In view of the foregoing, it appears that the news interview segments of both "Capital Edition" and "22:26" may be classified as bona fide news interviews. Accordingly, appearances by legally qualified candidates for public office on those segments that are broadcast under the circumstances and in the manner described in WUSA's pleading will be exempt from the equal opportunities requirement of Section 315.

7. Staff action is taken here pursuant to delegated authority.

FEDERAL COMMUNICATIONS COMMISSION

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange Carrier Transmittal No. 60
Association, Inc.
Revisions to Tariff F.C.C. No. 1

Northwestern Bell Telephone Co. Transmittal No. 1002
Revisions to Tariff F.C.C. No. 52

Pacific Northwest Bell Transmittal No. 172
Telephone Company
Revisions to Tariff F.C.C. No. 8

Bell of Pennsylvania Transmittal No. 769
Revisions to Tariff F.C.C. No. 41

Chesapeake and Potomac Transmittal No. 229
Telephone Companies
Revisions to Tariff F.C.C. No. 38

New Jersey Bell Telephone Company Transmittal No. 477
Revisions to Tariff F.C.C. No. 3

Illinois Bell Telephone Company Transmittal No. 764
Revisions to Tariff F.C.C. No. 43

Wisconsin Bell Telephone Company Transmittal No. 579
Revisions to Tariff F.C.C. No. 39

Ohio Bell Telephone Company Transmittal No. 682
Revisions to Tariff F.C.C. No. 38

Michigan Bell Telephone Company Transmittal No. 543
Revisions to Tariff F.C.C. No. 38

MEMORANDUM OPINION AND ORDER

Adopted: February 2, 1988; Released: February 16, 1988

By the Commission: Commissioner Dennis concurring in the result.

I. INTRODUCTION

1. ATE, Inc., COMTEL, Econocom TeleCommunications and Comput-A-Call (Petitioners) have filed an application for review of an Order of the Common Carrier Bureau issued in the above-captioned matter.[1] For the reasons stated below, we deny the application for review.

2. By the Order under review, the Bureau denied petitions to reject access tariffs for foreign exchange and off network access line (FX/ONAL) Feature Group A (FGA) services.[2] Petitioners assert that the Bureau action was arbitrary and capricious and contrary to Commission policy. Oppositions to the application for review were filed by the Ameritech Operating Companies (Ameritech)[3] and the National Exchange Carrier Association (NECA).

II. BACKGROUND

3. In *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, 101 FCC 2d 1222 (1985) (*Third Reconsideration Order*), this Commission concluded that the flat-rate structure for non-premium access, which charged the larger Other Common Carriers (OCCs) and smaller new entrants the same per-line rate, could constitute a significant entry barrier for new OCCs that are likely to have lower usage per line. [4] In order to avoid unreasonable discrimination against smaller, newer OCCs and thereby promote competition in the interexchange marketplace, we decided to establish a usage-based structure for all non-premium access charges, effective January 1, 1986.[5] Until that time, we noted, our Rules permitted the OCCs to avoid paying the usage surrogate of 9000 minutes of use per month by ordering FX lines and reselling them to form an MTS or WATS equivalent service.[6] The *Second Reconsideration Order* [7] had retained usage charges for open end FX/CCSA access when the OCC non-premium access charges were converted to a fixed per-line charge.

4. The tariff revisions at issue in this proceeding concerned the treatment accorded FX provided from end offices lacking measurement capability. Under the previously effective NECA tariff, FX and ONAL customers taking service from such offices were charged on the basis of a measurement surrogate of 3080 minutes of use. The captioned revisions, which were filed shortly after the *Third Reconsideration Order* was released, divide FX and ONAL access service into two categories: FX and ONAL access used for resale and FX and ONAL FGA that is not used for resale. In end offices lacking measurement capability, customers not using the service for resale would continue to be charged based on the 3080 minutes measurement surrogate. Customers reselling FX and ONAL FGA service, however, would be charged for an assumed 9000 minutes of use. These revisions were to expire at the end of 1985.

5. Petitioners sought rejection of the captioned tariff revisions, which were filed by NECA and certain Bell Operating Companies (BOCs). Petitioners claimed that the proposed tariff revisions constituted unreasonable discrimination and violated Sections 201(b) and 202(a) of the Communications Act, 47 U.S.C. §§ 201(b) and 202(a). Further, petitioners asserted that the revisions were contrary to this Commission's specific declarations in the *Third Reconsideration Order* and violated the non-discrimination provisions of the Modification of Final Judgment (MFJ) in *United States v. American Telephone and Telegraph Company*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983).

6. The Bureau was not persuaded that the use of the two-tier measurement surrogate until January 1, 1986[8] conflicts with this Commission's *Third Reconsideration Order*. The Bureau noted that in the *Third Reconsideration Order* this Commission had addressed only the question of whether OCCs should be given the choice of obtaining flat or measured FGA service during the period prior to January 1, 1986. The Bureau noted that we had given the

OCCs this option, thus leaving the FX loophole open, in order to produce an equitable result and remain consistent with previous decisions. Petitioners argued before the Bureau that this Commission's discussion of the FX loophole required that, if an end office lacks measurement capability, local exchange carriers (LECs) must bill all FX and ONAL customers according to a uniform measurement surrogate. The Bureau noted that this issue had not been presented for our consideration in the *Third Reconsideration Order*. The Bureau also observed that the 3080 minutes surrogate for FX service in unmeasured offices was established to protect low volume FX users and calculated on the basis of non-OCC usage. The Bureau said that allowing OCCs to be billed according to that surrogate would "produce an anomalous result. . . ."[9]

III. CONTENTIONS OF THE PARTIES

7. Petitioners argue that the Bureau's action in allowing these revisions to become effective was arbitrary and capricious for three reasons. First, petitioners contend, the Bureau permitted the creation of an unreasonable discrimination in charges based on the nature of the customer, in violation of Sections 201 and 202 of the Communications Act. Second, petitioners assert that the Bureau ignored record evidence that use of FX lines by resellers was substantially below the 9000 minutes of use surrogate adopted by the revisions. Finally, petitioners allege that the Bureau failed to consider the financial impact of its decision upon resellers and small OCCs, and based its judgment of the financial impact of its decision solely on the impact to be experienced by NECA and the BOCs, which the Bureau found to be minimal. Ameritech contests all these arguments and NECA similarly argues that petitioners have failed to establish any basis for reversal or modification of the Bureau's action.

A. Discrimination

8. Petitioners assert that the tariff revisions in question are discriminatory because they create two distinct classes of FX/ONAL customers based upon the identity of the customer and the use to be made of the service.[10] The revisions in question state that FX/ONAL FGA that is not used for resale would be billed on the asssumption of 3080 minutes of use (the previously effective surrogate for unmeasured FX/ONAL FGA), while FX/ONAL FGA used for resale would be billed on an assumed 9000 minutes of use (the usage surrogate previously in effect for MTS/WATS FGA). In addition, petitioners contend that this Commission explicitly recognized in the *Third Reconsideration Order* that resellers and small OCCs typically have usage levels well below the 9000 minutes per month that we adopted as a measurement surrogate for MTS/WATS FGA lines.[11] Petitioners assert that those usage characteristics made the application of a charge based on 9000 minutes of use unreasonably discriminatory against resellers and small OCCs.[12] Finally, petitioners assert that the availability of FX/ONAL service in end offices that are equipped to measure usage is an inadequate remedy for this purported discrimination because changing service to measured end offices would require substantial reconfiguration of existing networks.[13]

9. Ameritech responds that the two uses of FX/ONAL lines at issue are distinct and have characteristics that fully justify distinct rate treatment. In support of its position, Ameritech states that the measurement surrogate of 3080 minutes of use applied to non-resale FX/ONAL service is based on the average volumes of non-resale users. Ameritech also notes that the *Third Reconsideration Order* affirmed 9000 minutes per line per month as a reasonable average of OCC usage.[14]

B. Reasonableness of the Measurement Surrogates

10. Petitioners assert that the Bureau's action in allowing the two-tier surrogate structure to become effective was "arbitrary and anomalous."[15] They state that the Bureau recognized that this Commission had found the flat-rate structure to be harmful to smaller OCCs because these carriers typically had usage well below that of the larger OCCs. Nevertheless, petitioners claim, the Bureau noted that the existing usage surrogate of 3080 minutes per month was calculated exclusively on the basis of non-OCC usage and that the inclusion of OCC usage would have produced a higher surrogate. According to petitioners, the Bureau allowed the 9000 minute per month usage surrogate to become effective, despite its recognition that small resellers experienced less than 9000 minutes of use per month. Petitioners consider this action to be arbitrary.[16]

11. Ameritech notes that, although petitioners repeatedly assert that their usage is below 9000 minutes per month, they do not deny that it is greatly in excess of the 3080 minutes for which they wish to be billed.[17] Ameritech argues that combining the traffic volumes of resale and non-resale users into a single average would shift the cost burden created by resellers to traditional, non-resale users of FX/ONAL services. Thus, Ameritech concludes, billing resellers, such as petitioners, at the measurement surrogate for traditional FX/ONAL users would give the resellers a subsidy at the expense of either the traditional FX/ONAL users or the local exchange carriers.

C. Financial Impact

12. Petitioners also argue that the Bureau's action unreasonably prejudices the financial interests of resellers.[18] They assert that, in concluding that the financial impact of the revisions would be small, the Bureau failed to consider their impact on resellers and small OCCs. They also reassert that ordering service from measured end offices is not an adequate solution to their problem because of the cost and inconvenience of reconfiguring their networks.[19]

13. Ameritech responds that the only resellers that may be disadvantaged by the revised tariff terms are those that had planned to shift their costs to others. Ameritech notes that traditional FX/ONAL users will be unaffected by the revisions and that OCCs served from unmeasured end offices can obtain measured service for a nominal line rearrangement charge.[20]

IV. DISCUSSION

14. As we noted above, we deny the application for review, as petitioners have failed to establish any basis on which to reverse the Bureau's decision not to reject the tariff revisions. To warrant the extreme remedy of rejection, a petitioner must prove that the tariff is patently unlawful in that it conflicts on its face with the Communications Act or a Commission rule, regulation or order. *See , e. g., American Broadcasting Companies, Inc. v. FCC*, 633 F.2d 133, 138 (D.C. Cir. 1980); *Associated Press v. FCC*, 448 F.2d 1095, 1103 (D.C. Cir. 1971); *AT & T*, 67

FCC 2d 2031 (1979). Petitioners did not demonstrate that the captioned tariff revisions are patently unlawful and, accordingly, the Bureau's decision to deny the petitions to reject must be affirmed.[21] We address each of petitioners' claims below.

A. Discrimination

15. Petitioners argue that the usage patterns of resale and non-resale customers are so different that the Bureau erred by declining to reject the captioned tariff revisions on the ground that they are discriminatory. The record indicates, however, that resellers whose usage was substantially less than 9000 minutes of use per month had the option of obtaining service out of measured end offices. No petitioner has even attempted to demonstrate that this option involves an unduly burdensome or expensive reconfiguration effort. Moreover, the tariff provisions at issue here were in effect only for a brief interim period. In light of these factors and under the narrow circumstances presented by this case, we conclude that petitioners have failed to demonstrate that the tariff is on its face unlawful. *Compare National Association of Regulatory Utility Commissioners v. FCC*, 737 F. 2d 1095 (D.C.Cir.) *cert. denied* 105 S.Ct. 1224 (1984).

B. Level of Usage

16. We are not persuaded by petitioners' assertion that a surrogate of 9000 minutes for FX/ONAL resellers in unmeasured exchanges is patently unlawful. We first note that the 9000 minute figure is based on average OCC usage in measured end offices.[22] Petitioners have not contested that this is a reasonable estimate of industry-wide OCC usage in unmeasured exchanges. Although petitioners argue that their usage is, in many instances, below 9000 minutes, they have not demonstrated that some other number better reflects their actual average usage in unmeasured exchanges. We also note that there are relatively few end offices that lack measurement capability and the scope of any problem caused by use of the 9000 minute figure is quite limited. Moreover, it appears that resellers generally have the option of taking service from a measured end office. Thus, if the 9000 minute charge were far above usage in the case of a particular reseller in a particular end office, the reseller could request service through a measured end office and benefit by being charged on a measured basis. Based on these considerations, we cannot conclude that the level of the usage surrogate set forth in the tariff revisions is patently unreasonable so as to require rejection.

C. Financial Impact

17. We also reject petitioners' argument that the Bureau's action unreasonably prejudices the interests of resellers. Petitioners have failed to demonstrate that their allegations of adverse financial impact are sufficient to warrant rejection. Although petitioners contend that the network reconfiguration required to obtain service out of measured end offices would be costly and inconvenient, no evidence is presented to support this claim. On the contrary, Ameritech has stated that OCCs can obtain measured service for a nominal line rearrangement fee.

V. ORDERING CLAUSE

18. Accordingly, IT IS ORDERED that the application for review filed jointly by ATE, Inc., COMTEL, Econocom TeleCommunications and Comput-A-Call IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] National Exchange Carrier Association, Inc., Transmittal No. 60, Mimeo No. 6564 (released Aug. 23, 1985) (*FX Order*).

[2] Petitioners do not seek review of the Bureau's decision to the extent that the Bureau Order established a single measurement surrogate for all FGA services effective January 1, 1986, or to the extent that it rejected certain non-recurring charges contained in the captioned transmittals.

[3] The five Ameritech Operating Companies are Illinois Bell Telephone Company, Michigan Bell Telephone Company, The Ohio Bell Telephone Company and Wisconsin Bell, Inc. Indiana Bell did not file revisions affected by the *FX Order* and thus has not joined the other Ameritech companies in this pleading.

[4] *Third Reconsideration Order*, 101 FCC 2d at 1232.

[5] *Id.* at para. 15.

[6] This option was known as the "FX loophole" because it allowed OCCs to provide an MTS- or WATS-type service without having to pay either premium usage-based rates or the higher usage surrogate of 9000 minutes per month assessed for non-premium OCC access.

[7] MTS and WATS Market Structure, 97 FCC 2d 834 (1984).

[8] On that date, NECA and the BOCs were required to have in place a single FGA measurement surrogate for use at end offices lacking measurement capability. *FX Order* at para. 19.

[9] *Id.* at para. 17.

[10] Application for Review at 10.

[11] *Id.* at 9.

[12] *Id.* at 11.

[13] Petitioners also express concern that carriers will attempt to back-bill resellers using the revised measurement surrogate for usage dating to May 25, 1984, the date on which the LECs' switched access tariffs originally became effective. Application for Review at 10. Ameritech states that it does not intend to seek recovery of such back-billed amounts. Ameritech Opposition at 12. Petitioners' concern is not well-founded because no carrier could lawfully apply the new surrogate to periods before the effective date of these transmittals.

[14] Ameritech Opposition at 6, citing *Third Reconsideration Order* at 1235.

[15] Application for Review at 10.

[16] *Id.* at 7-10.

[17] Ameritech Opposition at 6-7.

[18] Application for Review at 11.

[19] *Id.* at 12-14.

[20] Ameritech Opposition at 11. Ameritech further notes that only carriers with usage below 9000 minutes of use per month would be likely to exercise this option.

[21] We here affirm the Bureau's decision only insofar as it declined to reject these tariff revisions. We emphasize that this Order does not represent a final determination that the captioned tariff revisions are lawful. Rather, we find only that petitioners have failed to demonstrate that the Bureau's Order should be reversed. Petitioners thus retain their rights to avail themselves of the complaint process contained in Section 208 of the Communications Act, 47 U.S.C. § 208.

[22] NECA found that average MTS/WATS-type usage exceeded 9000 minutes per line in measured exchanges. *See* NECA Reply To Petition to Reject filed July 12, 1985 at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-109

In re Applications of

MARK L. WODLINGER	File No. BPCT-851120KH
BHC ASSOCIATES, LIMITED PARTNERSHIP	File No. BPCT-860110KG
Richard J. Fox d/b/a COMANCHE ENTERPRISES	File No. BPCT-860110KK

For Construction Permit for a
New Television Station
Billings, Montana

ORDER

Adopted: February 5, 1988; Released: February 16, 1987

By the Review Board:

1. The *Initial Decision*, 2 FCC Rcd 6027 (ALJ 1987), in the above-captioned proceeding denied the application of Comanche Enterprises (Comanche) after finding that applicant financially unqualified to construct and operate its proposed facility for Billings, Montana.

2. Despite Comanche's disqualification, its failure to file any exceptions thereto, and its failure to seek to appear at oral argument, counsel for Comanche rose at the conclusion of the Board's oral argument and asserted his belief that Comanche remains a party to this proceeding. The Board thereupon informed counsel that in view of Comanche's uncontested disqualification by the ALJ and the provisions of Section 1.276(f) of the Commission's Rules, 47 CFR §1.276(f), [1] Comanche would not be deemed a party to the existing proceeding. [2] The Board further advised Comanche's counsel that its determination that Comanche was no longer a party to the ongoing proceeding would be memorialized in writing.

3. ACCORDINGLY, IT IS ORDERED, That the application of Comanche Enterprises IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Section 1.276(f) provides "when any party fails to file exceptions within the specified time to an initial decision which proposes to deny its application, such party should be deemed to have no interest in further prosecution of its application, and its application may be dismissed with prejudice for failure to prosecute."

[2] *See Moore Broadcast Industries, Inc.*, 2 FCC Rcd 6253 (Rev. Bd. 1987); *South Florida Broadcasting Co., Inc.*, 100 FCC 2d 973 (Rev. Bd. 1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 5, 1988

BELLSOUTH SEEKS WAIVER TO ALLOW AMORTIZATION OF DEBT REFINANCING EXPENSES AND UNAMORTIZED DISCOUNTS AND PREMIUMS ASSOCIATED WITH REACQUIRED DEBT.
Pleading Cycle Established

On January 28, 1988, the BellSouth Corporation, South Central Bell Telephone Company and Southern Bell Telephone and Telegraph Company (BellSouth), filed petitions for Waiver of Section 32.4240 of the Commission's Rules. During 1988, BellSouth anticipates the sale of long-term debt securities at an interest rate of 9% which will be used to fund the call of debentures bearing various interest rates and due dates. Instead of recognizing the gain or loss on the reacquired debt at the time of reacquisition, as required by Section 32.4240, BellSouth seeks a waiver to permit amortization of the debt refinancing expenses and the unamortized discounts and premiums, either over the life of the replacement debt issue or over the remaining life of the called debt issue. BellSouth states that if it is not allowed to amortize the refinancing costs, it will effectively be denied recovery of costs prudently incurred in the conduct of its regulated business. BellSouth states that its proposed refinancing of debt is in the best interest of ratepayers.

Parties wishing to comment on BellSouth's request should do so no later than **March 1, 1988.** Reply comments should be filed no later than **March 11, 1988.**

Parties are requested to serve copies of the comments upon International Transcription Services, Inc. at their offices in Room 246, 1919 M Street, N.W., Washington, D.C. 20554, and upon Kenneth P. Moran, Chief, Accounting and Audits Division, Room 812, 2000 L Street, N.W., Washington, D.C. 20554. Parties should refer to File No. AAD 8-1901.

Copies of the petition and related documents may be obtained from International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. The documents are also available for public inspection and copying in Room 812, 2000 L Street, N.W., Washington, D.C. 20554.

For further information contact Kenneth M. Ackerman at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Referral of Questions from General Communication Incorporated vs. Alascom, Inc. in the United States District Court for the Western District of Washington

Request for Declaratory Ruling of General Communication Incorporated Regarding Alascom's Misrepresentation and Misapplication of Its WATS Tariffs; File No. ENF-87-08

Request for Declaratory Ruling Regarding Refusal of Alascom, Inc. To Provide Verbal Price Quotations to General Communication Incorporated; File No. ENF-87-09

Request for Declaratory Ruling of General Communication Incorporated Regarding Alascom's Discriminatory Application of Its Interstate Tariff; File No. ENF-87-10

Request for Declaratory Ruling of General Communication Incorporated Regarding Alascom's Improper Conduct Relating to the Provision of 1.544 Mb/s Service; File No. ENF-87-11

Request for Declaratory Ruling Regarding Refusal of Alascom, Inc. To Assign NNX Codes to General Communication Incorporated; File No. ENF-87-12

Request for Declaratory Rulings Relating to Alascom, Inc. Transmittal No. 352 Proposing New 32 Kbps Digital Private Line Service; and File No. ENF-87-13

Request for Declaratory Ruling Pertaining to Alascom's Failure to Recover Its WATS Costs. File No. ENF-87-16

MEMORANDUM OPINION AND ORDER

Adopted January 29, 1988; Released: February 17, 1988

By the Commission:

I. INTRODUCTION

1. On April 24, 1984, General Communication Incorporated (GCI) filed an antitrust suit in the United States District Court for the Western District of Washington (the court) against Alascom, Inc. (Alascom), and the American Telephone and Telegraph Company (AT&T) alleging a number of violations of the federal antitrust laws.[1] The court determined that several of the allegations in the antitrust complaint implicated policies and practices of this Commission and referred several issues to us under the doctrine of primary jurisdiction.[2] The court directed the parties to present the referred issues to this Commission.

2. In response to the *Court Referral Order* and to an order of the Chief, Common Carrier Bureau (Bureau), establishing procedures for handling the referred issues,[3] GCI has filed several petitions for declaratory ruling in which it sets forth individual referred issues. [4] This Memorandum Opinion and Order will address the issues raised in seven of the petitions filed by GCI involving Alascom's alleged misrepresentation and misapplication of its WATS tariff, its alleged failure to provide certain price quotations verbally to GCI, its alleged discriminatory application of its interstate private line tariff, its alleged failure to fulfill its common carrier obligations in the provision of 1.544 Mbps service, its alleged unreasonable refusal to assign GCI NNX codes, its alleged failure to follow Commission rules in its tariff filing involving 32 Kbps service, and its alleged failure to recover certain of its WATS costs. Each petition will be dealt with seriatim in separate sections of this order with the exception that the issues raised in File Nos. ENF-87-08 and ENF-87-16 will be discussed together because these petitions raise interrelated issues.

II. BACKGROUND

3. Alascom is a facilities-based carrier which provides both intrastate telecommunications services in Alaska and interstate services to the other 49 states in conjunction with AT&T. For many years, it was the only telephone company authorized to provide interstate long distance service to and from Alaska.[5] It is the only carrier authorized to provide intrastate service in Alaska. On May 27, 1981, we authorized GCI to enter the Alaska market by issuing the necessary authorizations for its proposed interstate private line and MTS/WATS type services between Anchorage, Fairbanks and Juneau, Alaska and Seattle, Washington (and other points in the United States).[6] GCI commenced operations in November 1982. It is a facilities-based satellite common carrier and provides message toll and other interexchange telecommunication services between Anchorage and other areas in Alaska and the other 49 states. GCI provides these services in direct competition with Alascom and is the only other facilities-based interexchange carrier serving Alaska. GCI currently operates four primary earth station facilities located in

Anchorage, Fairbanks, and Juneau, Alaska and Seattle, Washington, along with other smaller earth station facilities.

III. MISREPRESENTATION AND MISAPPLICATION OF WATS TARIFFS (ENF - 87 - 08) AND FAILURE TO RECOVER WATS COSTS (ENF - 87 - 16)

A. *Introduction*

4. In this section we address GCI's April 4, 1986, and May 11, 1987, Requests for Declaratory Rulings (Petitions) presenting several issues relating to Alascom's WATS tariffs. In the April 4, 1986, Request for Declaratory Ruling of General Communication Incorporated Regarding Alascom's Misrepresentation and Misapplication of Its WATS Tariffs, File No. ENF-87-08, GCI requests the following rulings:[7]

> (a) That Alascom failed to follow its tariff for WATS access charges and this failure to observe its tariff is unlawful pursuant to Sections 201(b) and 203(c) of the Communications Act.
>
> (b) That Alascom's proposal to the Hotel Captain Cook, which charged an amount based on the aggregated volume of customer traffic rather than average usage, was not proper under Alascom's WATS tariff.
>
> (c) That Alascom's practice of offering certain customers a service under which interstate calls, billed at WATS rates, could be placed on the same line as local, intrastate and interstate MTS calls departs both from established Commission policy and from Alascom's own published tariffs, and, moreover, that this practice violates Sections 201(b), 202(a) and 203(c) of the Communications Act.

5. The May 11, 1987, Request for Declaratory Ruling Pertaining to Alascom's Failure to Recover its WATS costs (ENF-87-16) also relates to the $30.00 access line charge. Initially GCI had filed a formal complaint (E-85-14) regarding Alascom's failure to collect the $30.00 access line charge. This complaint was pending in April 1986 when GCI filed the first of these two requests for declaratory rulings. Therefore, in that request it presented the matter pursuant to section 1(b)(ii) of the Referral Order, but did not seek to reargue the issue in the context of the declaratory ruling petition. However, when the Commission resolved GCI's complaint, it found that Alascom was in technical violation of the Act, but it did not require Alascom to backbill its customers, as GCI had requested.[8] The Commission forwarded a copy of this decision to the District Court of the Western District of Washington as the Commission's response to that issue of the *Court Referral Order*. Thereafter, GCI reframed the issue and filed its second petition for a declaratory ruling. In this later petition it asserts that Alascom failed to charge its WATS customers in Anchorage a monthly access line fee from October 15, 1984, through June 9, 1985, even though it incurred costs for the use of Anchorage Telephone Utility's (ATU) local access lines. It requests that the Commission find that Alascom incurred costs in its provision of WATS service which it failed to recover and that "[t]hese costs arose from its responsibility either to recover Alascom's access costs, or alternatively, Alascom's contribution to AT&T's overall national costs (in an amount mirroring AT&T's WATS access line charge) pursuant to rate integration." Petition at 19.

B. *Contentions of the Parties and Discussion*

6. *MTS / WATS Service in the Kenai - Soldotna Area.* We turn first to GCI's allegation that Alascom failed to require WATS users to employ an exclusive WATS access line. It charges that Alascom configured a system outside both its WATS and MTS tariffs "designed to enhance its competitive position vis-a-vis GCI." Petition at 10. GCI asks the Commission to find that Alascom departed from established Commission policy and from Alascom's published tariffs by offering certain customers a service by which interstate calls, billed at WATS rates, could be placed on the same line as local and MTS calls. In support, GCI contends that a number of Alascom's business customers which were nominally WATS subscribers were charged lower WATS rates for interstate MTS calls, but that they had no WATS access lines and used standard business lines to originate and receive local calls and intrastate, interstate, and international MTS calls. GCI attaches bills of several customers who purchased WATS service, indicating that the WATS line was not limited solely to WATS usage. GCI alleges that this conduct violates section 203(c) of the Communications Act, 47 U.S.C. § 203(c), because Alascom charged less than its applicable MTS tariff rate for interstate calls on lines that did not qualify for WATS treatment under its WATS tariff; that it violates section 202(a) of the Act, 47 U.S.C. § 202(a), because the reduced rate was charged only to some customers, while other similarly situated customers were charged higher MTS rates; and that it violates section 201(b) of the Act, 47 U.S.C. § 201(b), because it is an unjust and unreasonable practice.

7. Alascom admits that, because of technical limitations of certain local carriers' central offices, it was possible in the Kenai/Soldotna area to make non-WATS calls on designated WATS lines. Alascom observes that it first established WATS service in Alaska in 1978 and that in its original tariff it advised the Commission that non-WATS calls could be made because local exchange companies in Kenai/Soldotna lacked the necessary screening and blocking facilities.[9] According to Alascom, the Commission approved the tariff, with this acknowledged limitation, on September 14, 1978, since the alternative would have been to deny WATS service to all communities in Alaska served by carriers lacking blocking and screening capability. Alascom asserts, however, that despite the technical limitations, all calls have been properly billed. In addition, Alascom claims that it is its policy to inform customers applying for WATS service that they need a line dedicated to WATS in addition to their regular business or residential lines if they desire to make MTS calls. However, it asserts that it is not in a position to always enforce proper use of WATS lines. Alascom notes that the bills attached to GCI's request demonstrate that Alascom differentiated between WATS and non-WATS calls in its billings and charged appropriate rates for the calls.

8. Besides reiterating arguments advanced in its petition, GCI replies that, contrary to Alascom's contention that screening and blocking have not been available in Kenai and Soldotna until recently, these features have been available even prior to GCI's entry into those markets.

GCI maintains that Alascom cannot be permitted to defend its failure to insist on separate lines for WATS and MTS service on the basis of that limitation.

9. As Alascom admits, it appears that it was possible, due to the lack of screening and blocking capability, for customers in certain areas to make non-WATS calls on designated WATS lines. GCI offered no evidence to prove that Alascom in fact charged WATS rates for calls that did not qualify for WATS treatment. Indeed, the submissions of the parties document the efforts Alascom has taken to ensure correct billing. Thus, the record supports Alascom's claim that it does separate such calls manually and that customers are charged the appropriate rate for each type of call. Alascom has also demonstrated that its WATS tariff was permitted to take effect in 1978 subject to this limitation.[10] The Commission refused to reject or suspend the tariff stating that the nature of interconnection arrangements between Alascom and local Alaska telephone companies raised difficult questions as to the technical and economic feasibility of requiring separate access lines and use of blocking and screening equipment. The Commission noted that parties could raise this interconnection matter later by complaint under section 201(a) of the Act, but stated that such complaint should be:

> factually complete and will not consist of vague, unsupported allegations of anticompetitiveness. We would also hope that any such complaint will fully address the issues of the technical and economic feasibility of allowing a local Alaskan telephone company to use its blocking and screening . . . and will take into account the peculiar circumstances present in Alaska . . . [including] how a given method of interconnecting . . . would serve the overall public interest.

RCA Alaska Communications, Inc., 69 FCC 2d 686, 692 (1978).

10. GCI has provided no factual support to demonstrate that Alascom's provision of Out-WATS service in the manner proposed in its tariff is improper, beyond its bald assertion that such conduct violates the Act.[11] GCI's assertion that Alascom's practice is contrary to established Commission policy and Alascom's published tariffs is unpersuasive in light of the Commission's decision that allowed Alascom's tariff to go into effect. In so doing, the Commission addressed the issue of using the MTS network for WATS calls and refused to reject or suspend the tariff. 69 FCC 2d at 687. The WATS billing procedure proposed by Alascom, which entailed segregating WATS calls manually or by a special computer subroutine, anticipated that calls other than WATS calls would be made on the WATS line. Despite this fact, Alascom informed its WATS customers that they needed a line specifically dedicated to WATS in addition to their regular residential or business lines.[12] Since Alascom's application of its WATS tariff was consistent with our decision which permitted that tariff to go into effect, its conduct did not patently violate either Commission policy on its face or Alascom's own tariff. In the absence of any other allegation of unlawfulness, we reject GCI's contention that Alascom violated section 203(c) of the Act by charging less than its MTS rates for calls that did not qualify for WATS treatment under its WATS tariff.[13] We also reject GCI's argument that Alascom is violating section 202(a) by charging similarly situated customers different rates since GCI's evidence demonstrates that Alascom billed MTS calls placed over WATS lines at MTS rates. Likewise, GCI has failed to prove that Alascom's conduct is unjust and unreasonable, thereby violating section 201(b).

11. *Misrepresentation of Tariffs.* Turning to GCI's allegations that Alascom unlawfully misrepresented Alascom's published tariff charges to a number of customers, GCI states that Alascom's Tariff F.C.C. No. 3, Section 3.4.1(A), provides that where a customer employs multiple WATS lines the total billing is based upon the average usage over all lines. However, Alascom offered to provide the Hotel Captain Cook with WATS service at a price apparently reached by aggregating the total expected usage on one line rather than averaging the expected usage over all of the hotel's WATS lines. The resulting cost per call was lower than GCI's charges. The hotel cancelled its GCI service and ordered service from Alascom based upon Alascom's lower offer. When GCI advised the hotel that Alascom's bid was in violation of the tariff, and the hotel, in turn, questioned Alascom about its offer, Alascom allegedly confirmed its price quote. Later that day, however, after reviewing the tariff and determining that the offer did not comport with the pricing method set forth in its tariff, Alascom retracted the offer. GCI claims that Alascom then made a second improper offer to install thirteen lines to the hotel under thirteen separate accounts so that the heavy volume on certain lines could be billed at a volume rate, resulting in overall lower costs to the hotel. GCI contends this proposal also constituted misrepresentation of Alascom's tariff, which requires that all lines to a single premises be included in computing the average usage for billing purposes. GCI claims that after it informed the hotel that this also violated Alascom's tariff, Alascom notified the hotel that it could not provide the service as proposed.

12. For its part, Alascom admits that it made the first offer using an improper averaging method for computing WATS charges under its tariff, but it states that it withdrew the offer within hours of discovering its mistake. It emphasizes that this Hotel Captain Cook offer was a single incident and that no similar rates were extended to any other customer. It contends that such an isolated incident does not constitute a violation of the Act. Alascom denies that it offered multiple accounts as a way to achieve lower rates. It states that there was a discussion with the hotel about thirteen WATS lines to be billed under thirteen different accounts, but that it told the hotel that such an arrangement would violate its tariff, and, therefore, it could not offer service under those terms.

13. There is no dispute that Alascom offered service to the Hotel Captain Cook at a rate based on a pricing methodology that did not comport with Alascom's tariff. Therefore, we issue the requested ruling that the proposal to the Hotel Captain Cook which based charges on aggregated volume rather than average usage was not proper under Alascom's tariff. We note, however, that the offer was promptly withdrawn, that there was no apparent injury to GCI since the hotel remained GCI's customer. As to the assertion that Alascom proposed to offer service to the hotel under thirteen different accounts, Alascom denies that any such offer was in fact made, and GCI submitted insufficient evidence to prove its allegation. Despite GCI's allegation that Alascom misrepresented its published tariff charges to "a number of customers" (Petition at 8), GCI presented no evidence of any other similar erroneous offers. Thus, we are constrained to con-

clude that the Hotel Captain Cook offer was an isolated incident. Therefore, there is insufficient evidence in the record for us to conclude that Alascom followed a pattern of misrepresenting its tariffs as alleged by GCI.

14. *Access Line Fee.* We have already resolved the issue of whether Alascom misapplied its WATS tariff by failing to charge the $30.00 monthly access line fee contained therein.[14] Therefore, we need not further consider the issue originally referred by the Court and raised in GCI's April 1986 petition. Instead, we will address the issue raised in GCI's May 1987 petition, namely, whether by not charging its WATS customers a monthly access line fee between October 15, 1984, and June 9, 1985, Alascom failed to recover its WATS costs during that period.

15. As discussed briefly above,[15] prior to October 15, 1984, Alascom charged to and collected from its WATS customers a $30.00 monthly local channel fee contained in its WATS tariff then in effect. It notified its multiline business customers that as of that date the local channel fee would be replaced by a $6.00 per line end user fee charged directly by ATU under ATU's interstate access tariff. Alascom stopped charging its customers the $30.00 local channel fee but did not file a new tariff to remove the fee until April 26, 1985, to become effective June 9, 1985. That tariff removed the $30.00 charge it had collected for ATU and imposed its own $31.37 access line charge, for the purpose of enabling it to recover its costs for the access charges it paid to local exchange carriers. Meanwhile, GCI had filed a complaint against Alascom, alleging that it should have continued to collect the $30.00 monthly fee and that Alascom's WATS customers in ATU's service area should have been paying both the $30.00 monthly access line fee to Alascom and the $6.00 end user access fee to ATU. The Commission determined that the $30.00 charge was an ATU access fee, not an Alascom charge, and found that Alascom correctly recognized that ATU was entitled to charge its multiline business customers only the $6.00 end user fee. Any remaining fixed costs of ATU were to be recovered through access charges imposed on interexchange carriers. However, the Commission stated that the $30.00 fee should have been removed from Alascom's tariff, and Alascom was in technical violation of section 203(c) of the Act for failing to adhere to its tariff. Moreover, its failure to revise its tariff promptly to remove the void charge was technically a violation of section 201(b) of the Act. However, the Commission found that Alascom had been attempting to discover from Commission staff how to implement the Commission's new compensation practices set forth in its *Access Charge* decisions.[16] It also noted that some delay was inevitable because several local exchange carriers delayed in filing their access tariffs, which deprived Alascom of information it needed to develop its rate. Alascom needed this information to develop its own WATS access charge costs, and it also needed to know AT&T's plans so that it could maintain rate integration for other WATS rates. The Commission found that the special circumstances of this case mitigated Alascom's delay and that no forfeiture was warranted.

16. On reconsideration, GCI asked the Commission to rule that during this period there were access line costs incurred by Alascom that were not recovered. GCI sought this ruling for the first time, however, on reconsideration. The Commission denied the petition for reconsideration and informed GCI it should file appropriate pleadings to develop a record for disposition if it wished to pursue this new issue. *GCI v. Alascom, Inc.*, 2 FCC Rcd 805 (1987).

17. Accordingly, GCI filed its May 11, 1987 request for a declaratory ruling alleging that, although Alascom did not charge its customers an access line charge for seven months beginning in October 1984, it incurred costs for using ATU local access lines. Also, GCI asserts, during this period AT&T's rates, which Alascom must follow pursuant to the Commission's rate integration policy, included a WATS access line charge. Therefore, GCI concludes that Alascom incurred costs which its WATS rates were not designed to recover. GCI argues that although "Alascom claimed it was confused as to the appropriate level of the WATS access line charge," (Petition at 3) it in fact "dropped the WATS access line charge after performing analyses which showed that lowering the charge would enhance Alascom's marketing efforts." *Id.* GCI characterizes Alascom's confusion as "feigned" and concludes that while it enhanced Alascom's marketing position, it cost Alascom nothing since its costs are covered pursuant to its participation in the national cost pool. Only after GCI filed its complaint[17] did Alascom file an access line charge of $31.37. Alascom Tariff F.C.C. No. 9, Transmittal No. 322 (April 26, 1985). GCI argues that Alascom conceded it incurred access costs after the *Access Charge* decisions altered the method of compensating local exchange companies for providing access to interexchange carriers. Petition at 8-9. Thus, while Alascom incurred costs when it paid access charges to ATU, it did not charge its customers, but instead recovered the costs from AT&T, which in turn recovered access costs partly from AT&T's customers through usage-sensitive WATS rates and partly through a WATS access line charge it charged to its own customers. GCI maintains that under rate integration AT&T's tariff is designed to recover all of AT&T's costs -- including Alascom's costs. Alascom's costs are included in the national cost pool under the separations and settlements system. According to GCI, if Alascom charges less than AT&T for the WATS access line charge, Alascom skews the rate integration process because its contribution to the national pool is deficient. GCI alleges that Alascom itself has asserted that it is required to mirror AT&T's rates, although in its opposition in the complaint proceeding on this matter it maintained that the WATS access line charge had "no relationship to rate integration." Opposition at 7. GCI claims that Alascom's analysis of the market to determine the impact of various line charges showed that by lowering the access fee to $10.00 it could eliminate GCI from the market, but that because of rate integration it was unable to do so. However, with the 1984 transition to access charges, it "was presented with an opportunity to discontinue charging a WATS access line charge while feigning confusion as to its obligations." Petition at 16. It then actively marketed its reduced-rate WATS service.

18. In its opposition, Alascom contends that the Commission has already acknowledged for the most part that it took reasonable steps to implement a new WATS access line charge, that there is no evidence of a failure to recover costs, and, at most, Alascom was in technical violation of its tariff. Alascom explains that it disagreed with ATU on the correct implementation of the *Access Charge* decisions, ATU arguing that the $6.00 end user charge was to be imposed in addition to the $30.00 charge. ATU finally conceded that Alascom was correct and in

February 1985 informed its customers of the effect of the changes. Alascom maintains that there was great uncertainty surrounding ATU's access tariff, which was revised twenty-one times in less than a year. As a result of revisions and deferrals of its tariff, ATU did not have an effective tariff until June 15, 1985. Alascom sought advice from Commission staff and suggested that it charge the same as AT&T's access line charge. The staff, however, told it that access line charges were for the local loop portion of an interstate service and not subject to national rate integration. Alascom attempted to develop composite Alaskan access costs based upon the access tariffs to which it was subject, but that attempt proved to be unworkable. Therefore, the charge that was eventually implemented did not mirror AT&T's charge, but rather was a composite based on local exchange carrier rates prior to access charges. Alascom maintains that GCI has offered no evidence that Alascom's WATS revenues failed to recover all WATS costs. Nor is there any evidence of an unlawful or anticompetitive effect. Moreover, according to Alascom, "the basis of GCI's allegations concerning delay actually rest on the regulatory process and not anticompetitive acts or marketing ploys, as GCI -- without benefit of credible evidence -- would have it." Opposition at 11. Finally, Alascom denies conducting a study concerning the competitive effects of a lower WATS access line rate. Alascom's work papers, obtained by GCI through discovery in the court action and submitted to us to support that allegation, were in fact a hypothetical evaluation of the viability of a reseller that resold Alascom's WATS service and were misconstrued by GCI.

19. In its reply, GCI reiterates arguments previously advanced. It adds that Alascom has apparently dropped its claim that a separate WATS access line charge is appropriate, because it has since adopted the same access line fee charged nationally by AT&T. Alascom Tariff F.C.C. No. 3, Transmittal No. 463 (July 2, 1987). Moreover, it claims that Alascom's interstate MTS/WATS service has always generated more costs than revenues and the shortfall is subsidized by the national settlements pool. Any rate reduction in Alascom's WATS service, therefore, increased the discrepancy. GCI characterizes Alascom's opposition as devoted mainly to reasons why it did not charge an access line fee in a timely manner. GCI contends that the reasons are immaterial since Alascom was in fact obligated to charge such a fee. Even if mitigating circumstances were relevant, GCI maintains Alascom has not shown why it could not have implemented the charges in October 1984. GCI points out that the charge finally implemented in June 1985 was a composite based on local exchange rates *prior to* implementation of the October 1984 access charges. GCI also avers that Alascom does not dispute that it marketed WATS aggressively during the period when no access line fee was charged.

20. In a supplemental filing, GCI submits depositions from John McGraw, Alascom's Manager of Tariffs and Regulatory Affairs, and Michael K. Nichols, Alascom's Vice President of Marketing. The McGraw deposition allegedly demonstrates that Alascom knew that the WATS rates without the $30.00 monthly line charge were insufficient to cover the costs incurred in providing the service. The Nichols deposition shows that the two men disagreed about whether Alascom should charge an access line fee, that Nichols decided to discontinue the $30.00 fee even though he believed a monthly fee was appropriate, and that Alascom actively marketed the reduced-rate WATS service.

21. In Alascom's response to the supplemental filing, it asserts that the "new evidence" is cumulative in nature and adds nothing substantive to the record. It characterizes the "uncovered" evidence as "tiny snippets" from two days of testimony of Mr. McGraw. It reiterates that the Commission knew that for seven months Alascom did not charge customers for one rate element and excused it. Therefore, it concludes that the Commission should deny GCI's proposed findings and adopt those proposed by Alascom.

22. We agree with GCI's claim that the logic of rate integration requires that Alascom charges to interstate WATS customers in Alaska parallel AT&T charges to customers in the contiguous states for WATS service between the contiguous states and Alaska. Alascom has maintained parallel charges since June 1, 1986, but Alascom and AT&T WATS charges diverged from April 17, 1984, through May 31, 1986. This divergence was apparently attributable to the confusion surrounding the AT&T divestiture and the implementation of this Commission's access charge rules.

23. The predivestiture AT&T WATS tariffs contained a combination of fixed and usage charges. Although AT&T described the fixed monthly charge as a "WATS access line charge," that charge predated the adoption of this Commission's access charge rules and did not reflect the amounts that local exchange carriers actually received through the settlements and division of revenues process for providing WATS access lines. The access charge rules that were in effect when Alascom filed a revised WATS tariff would have changed LEC compensation for that access service by substituting LEC access charges based upon the cost of the dedicated line for usage-based settlement compensation. The LEC access charge was to be billed to either the end user or the interexchange carrier.[18] The Alascom tariff, which substituted a $30 ATU special access line charge for the predivestiture WATS access line charges ($31.65 for WATS lines and $36.80 for 800 lines), was entirely consistent with those rules. The relevant rules were, however, changed in our February 1984 *Second Reconsideration Order*. The *Second Reconsideration Order* reclassified the WATS access line as a common line, which was subject to a $6 end user common line charge and a usage-based carrier common line charge, and removed WATS access lines from the special access category.[19] Alascom erred by failing to make prompt revisions in its proposed tariff to conform with the revised access charge rules. This Commission also erred by permitting that unrevised Alascom tariff to become effective in April 1984 when it was not consistent with the revised rules.

24. Alascom attempted to remedy that error by ceasing to collect the $30 Anchorage charge in October 1984, but an Alascom tariff eliminating the ATU access line charge did not become effective until June 1985. We have already determined in the complaint proceeding that Alascom violated section 203 of the Communications Act, 47 U.S.C. § 203, by failing to collect a charge in its tariff. Alascom also violated the access charge rules by maintaining a tariff provision that purported to pass through an ATU charge that ATU was not allowed to assess.

25. The absence of coordination between Alascom and AT&T also produced results that are not fully consistent with our rate integration policy. AT&T elected to retain

its predivestiture WATs access line charges until June 1, 1986, and periodically revised the usage charges to reflect changes in access expense. Alascom collected charges that differed slightly from AT&T WATS access line charges during the April - October 1984 and June 1985 - May 1986 periods and did not collect any form of WATS access line charges during the October 1984 - June 1985 period.

26. Although we have no reason to question Alascom's assertion that our staff advised Alascom that a WATS access line charge would conflict with the *Second Reconsideration* access charge rules, we do not agree with that advice. Neither the access charge rules nor any Commission order required interexchange carriers to reflect all usage-based access charges in usage charges to their own customers. AT&T and Alascom had discretion to retain, replace or revise the WATS access line charge while the *Second Reconsideration* access rules were in effect. Those carriers should have exercised that discretion in a coordinated manner in order to achieve results that are consistent with our rate integration policy.

27. The record in this proceeding does not, however, support or refute GCI's assertion that the AT&T-Alascom partnership failed to recover the WATS revenue requirement during the October 1984 - June 1985 period because Alascom did not collect a WATS access line charge in addition to the usage charges. The AT&T WATS usage charges that became effective in May 1984 were not designed to recover the balance of a separate WATS revenue requirement. We directed AT&T to implement an across-the-board reduction in MTS and WATS usage rates to reflect the reduction in access expenses for switched services that resulted from initial implementation of switched access charges.[20] Therefore, there would be no reason to expect a close correlation between WATS revenues and a WATs revenue requirement with or without a WATS access line charge in Alaska. Although AT&T submits earnings reports to this Commission, AT&T has not submitted any actual earnings reports that correspond with the period in question which would permit us to determine whether a shortfall did or did not exist. Therefore, we cannot grant GCI's request that we issue a declaratory ruling that Alascom (or the AT&T-Alascom partnership) failed to rcover WATS costs.

IV. FAILURE TO PROVIDE VERBAL PRICE QUOTATIONS (ENF - 87 - 09)

A. *Introduction and Contentions of the Parties*

28. In this section we address GCI's November 19, 1985, request for declaratory ruling seeking the following determinations: (1) that Alascom was not compelled by the Communications Act (the Act) or by any Commission rule or policy to require GCI to obtain price quotations for private line service in writing, while others obtain such pricing information orally;[21] and (2) that Alascom's "discriminatory practice" of refusing to provide GCI with verbal price quotations was in violation of section 202(a) of the Act, 47 U.S.C. § 202(a).[22] For the reasons set forth below, we find that Alascom was not mandated by any provision of the Act or a Commission rule or policy to require written communications regarding price quotations and, under the circumstances presented, we conclude that Alascom's conduct was not unlawfully discriminatory in violation of section 202(a).

29. GCI states that, prior to June 7, 1984, Alascom customers, including GCI, were able to contact Alascom's marketing department by telephone and obtain oral price quotations and projected installation dates for any Alascom connecting circuit needed by the carrier to provide through service to GCI's existing or potential customers. However, GCI claims that, effective June 7, 1984, Alascom changed its policy solely with respect to GCI to the extent that only written requests for price quotes and projected installation dates would be acceptable from GCI.

30. GCI contends that this change in policy with respect to it was unreasonable because it delays its ability to provide potential private line customers a rapid analysis of circuit costs and projected installation dates. It claims that a potential customer will not deal with a carrier which takes weeks to provide a simple price quotation.[23] It argues that Alascom's practice places it at a severe competitive disadvantage because it cannot provide a potential customer a quick response. This limbo period, it claims, could lead the disaffected customer to seek out this information from Alascom directly or allow Alascom the opportunity to independently solicit that potential customer.

31. In its response, Alascom has admitted that it changed its policy but contends that it was reasonable under the circumstances and therefore not unlawfully discriminatory in violation of section 202(a). It claims that its change in policy for dealing with GCI on price quotations was a direct result of the instant antitrust litigation between the parties. It states that, shortly after this suit was filed, its antitrust counsel recommended that it adopt a policy of dealing with GCI on matters of price quotations and ordering arrangements solely in writing in order to provide an evidentiary record of transactions which were heavily implicated in the general antitrust allegations in the suit. In sum, Alascom believes its policy is reasonable and prudent in the face of the huge amount of damages sought by GCI and strikes a balance in favor of preserving the evidence of transactions between the parties which are adversaries both as litigants and competitors, which distinguishes GCI from Alascom's other customers.

B. *Discussion*

32. Neither the Act, the Commission's Rules, nor any established Commission policy compels Alascom or any carrier to require its customers to submit requests for price quotations in writing. On the other hand, this practice is not expressly prohibited. The practices employed by a carrier in dealing with its customers are usually carrier initiated, subject to the requirement that the practice be just, reasonable, and not unlawfully discriminatory. *See* 47 U.S.C. §§ 201(b) and 202(a). The Commission will prescribe that a particular practice be followed only after it determines that the carrier-initiated practice is unlawful and the public interest justifies the Commission's prescription, 47 U.S.C. § 205.

33. It is clear that GCI has established a *prima facie* case that Alascom has discriminated against it. Alascom has admitted that written requests for price quotations were required only from GCI and therefore concedes that its action was discriminatory. Thus, the burden of proceeding shifted to Alascom to show that this discrimination was reasonable and not an unlawful violation of the Act. *See , e. g., In Re Application of John Lamar Hill*, 61 FCC 2d 375, 377-78 (1976). We believe that Alascom has met this burden by showing that its practice was precipitated by

the antitrust litigation. Absent a factual record showing that Alascom engaged in a pattern of significantly varying its response time to price quotations submitted by GCI, we cannot make the requested finding. The record before us indicates that Alascom has simply sought to preserve in writing the dealings between the parties during the period after GCI filed its first antitrust complaint.

34. GCI's attempted showing of potential harm from Alascom's policy is also not persuasive because GCI has provided no evidence that Alascom's responses were either unduly delayed,[24] or that any potential GCI customers were frustrated by GCI's inability to provide a more rapid price quote and, therefore, independently sought out Alascom as an alternative carrier. Since we are presented only with hypothetical scenarios developed by counsel, we cannot conclude that Alascom's conduct is unreasonable. Therefore, we find, based on the record before us, that Alascom's conduct was not unlawfully discriminatory and did not violate section 202(a) of the Act.

V. DISCRIMINATORY APPLICATION OF INTERSTATE PRIVATE LINE TARIFF (ENF - 87 - 10)

A. *Introduction*

35. In this section we address GCI's petition filed April 1, 1986,[25] seeking declaratory rulings whether a particular unreported order of the Common Carrier Bureau[26] is controlling precedent in similar factual situations. The specific issues which the court directed the parties to refer are those contained in paragraph 2 of the *Court Referral Order*. Paragraph 2, under the heading "Tariffs," reads as follows:

> (a) Alascom contends that the FCC should determine whether Alascom engaged in or attempted to engage in selective application of its intrastate and interstate tariffs and other conduct as alleged in paragraph 27(e), (f), (g) and (i) [of GCI's second amended complaint for antitrust damages and injunctive relief].
>
> (B) GCI contends that the basic question relating to Alascom's characterization of interstate/intrastate services and the resulting application of its tariffs was decided by the FCC in [*Wright)* Schuchart].

36. The GCI request before us arises out of a dispute about what tariff provisions and rates Alascom should charge for the use of Alascom private lines located physically within the State of Alaska, when such lines are obtained in conjunction with GCI interstate communication services. The issue first came before the Bureau in an informal complaint filed by Arctic Slope Wright Schuchart (Arctic Slope) contesting Alascom's refusal to apply its interstate tariff to circuits it provided to Arctic Slope within Alaska.[27] A related informal complaint was filed by GCI.[28] Before Arctic Slope became GCI's customer in early 1983, it had been charged interstate rates by Alascom on all of its private line services. However, after Arctic Slope substituted GCI for Alascom as the supplier of its interstate circuits, it was notified by Alascom that significantly higher intrastate rates would be charged on the physically intrastate links still supplied by Alascom. Arctic Slope notified Alascom that the Alascom lines still were routed through the same automatic switching system into the interstate system as before and that it would not pay intrastate rates. Alascom responded that Arctic Slope's service would be disconnected if full payment of Alascom's intrastate charges were not received in a timely fashion.

37. Acting on the informal complaints of Arctic Slope and GCI, the Bureau initiated a show cause proceeding,[29] ultimately concluding that Alascom's interstate private line tariff, Alascom Inc. Tariff F.C.C. No. 1, contained no language barring the tariff's application to the Alascom-provided physically intrastate portions of interstate circuits used by GCI or GCI's customers.[30] In addition, the Order found that section 1.1.4 of Alascom's tariff did not meet the requirement of the Commission's rules that tariffs should be clear and unambiguous and that the tariff should be revised to remove any doubt that the tariff applied to private line service from points in Alaska to points in the United States through interconnection with other carriers.[31] The Order also concluded that Alascom had not justified applying intrastate tariff rates for portions of interstate circuits rather than applying interstate tariff rates. Alascom therefore was found to have violated section 202(a) of the Act by unjustly discriminating in the application of intrastate rates for interstate service to Arctic Slope and GCI.[32] Although the Bureau found that, when Alascom refused to install the requested circuits until GCI and Arctic Slope agreed to pay intrastate rates for the service, it had violated section 202(a), the Bureau concluded that it was "not necessary" to impose penalties under section 202(c) in "this case" because certain agreements entered into by Alascom with the complainants had "removed any danger that Arctic Slope or GCI would suffer any financial harm as a result of Alascom's actions during the pendency of this proceeding."[33] The Bureau's Order provided that Alascom "shall at once provide intra-Alaskan portions of interstate service at the interstate rates specified in Alascom, Inc.'s Tariff F.C.C. No. 1, in accordance with customers' and competitors' requests."[34] None of the parties sought Commission or court review and the Bureau's Order accordingly became final.

B. *Contentions of the Parties*

38. GCI contends that Alascom holds a monopoly position with respect to interexchange services in the Alaska market and also is directly affiliated with several local exchange companies serving Alaska. GCI further alleges that, since it entered the Alaska market in 1982, Alascom has engaged in systematic anticompetitive pricing through selective application of its interstate and intrastate tariffs. According to GCI, Alascom saw an opportunity for competitive advantage in the fact that its intrastate private line rates (Alascom Tariff APUC No. 98) were 87 percent higher than its interstate private line rates and used this disparity to discriminate against communications users who obtained or considered obtaining connection to their service points outside of Alaska via GCI's system. GCI alleges that it became Alascom's practice to apply its lower interstate rates for connecting links within Alaska (which only Alascom could supply) only if Alascom also provided the connecting interstate circuit to and from Alaska. According to GCI, if an existing or prospective customer of Alascom or GCI selected GCI's competing interstate service, Alascom charged higher intrastate rates on the intrastate portion of the customer's circuit. GCI

concludes that, in this way, Alascom discouraged or prevented customers of interstate links from purchasing service from GCI.

39. GCI contends that *Wright Schuchart* makes clear that Alascom had no basis for its failure to provide and price GCI's connecting interstate circuit orders pursuant to its Tariff F.C.C. No. 1. That order made clear, contrary to Alascom's assertion, that such tariff did not require the entire circuit to be purchased from Alascom for the tariff to apply. Moreover, GCI contends that Alascom's position that it could impose the 87 percent higher intrastate rate was untenable in view of the intrastate tariff's explicit language which prohibited resale. In contrast, GCI notes that Alascom's interstate tariff explicitly permitted resale. GCI concludes that, while Alascom provided and priced physically intrastate circuits pursuant to Tariff F.C.C. No. 1 for its own customers, it unlawfully refused to interconnect GCI's interstate customers pursuant to this same tariff. According to GCI, Alascom's interpretation and application of its tariff was an arbitrary discrimination targeted specifically at its new competitor, GCI.

40. GCI further alleges that Alascom's discriminatory application of its tariffs created uncertainty in the Alaska market over an extended period following GCI's entry and adversely affected its initial efforts to market its competitive interstate services. According to GCI, many potential customers were reluctant or unwilling to risk a protracted billing dispute with Alascom. GCI provides some examples which it alleges are, in all relevant respects, the same practice of discriminatory reclassification used to discourage purchase of GCI's services that was ruled improper in *Wright Schuchart*. GCI asks that we find that *Wright Schuchart* is controlling precedent as to Alascom's characterization of interstate/intrastate services and the resulting application of tariffs in each of these situations and in any other circumstances that are the same in relevant respects.

41. For the most part, Alascom does not take issue with GCI's description of the *Wright Schuchart* findings and holding or deny the facts presented by GCI. Instead, Alascom contends that GCI's request for a finding that *Wright Schuchart* applies as precedent to other similarly situated customers is an attempt to reopen and modify *Wright Schuchart* and that such an attempt is precluded by *res judicata*. A large part of Alascom's reply is directed at the question of its "good faith" and intent, which are at the heart of the issues in *GCI v. Alascom*, even though it correctly notes that *Wright Schuchart* made no findings concerning its subjective intentions. Alascom contends that it acted reasonably and in good faith and that *Wright Schuchart*'s rejection of its tariff interpretation did not convert such good faith position into a deliberate anticompetitive plot. Among other relief it requests, Alascom urges that we declare the limited scope of the Bureau's investigation, findings and conclusions under section 202(a) of the Act and that *Wright Schuchart* reached no conclusions relating to any anticompetitive purposes or effects with respect to Alascom's tariff applications. Alascom urges that we deny GCI's request for declaratory rulings and let the Order stand on its own.

C. *Discussion*

42. In *Wright Schuchart* as previously noted, neither the complainants nor Alascom sought Commission or court review of the Bureau's decision under delegated authority and the Bureau's action, accordingly, became a final agency order. In that proceeding, the Bureau found that Alascom knowingly and unlawfully discriminated in violation of section 202(a) of the Act by charging its competitor, GCI, intrastate rates for interstate service requirements of one of GCI's customers while charging its own customers lower interstate rates.[35]

43. Under the doctrine of *res judicata*, when a final agency order has adjudicated the issues on their merit, those issues should not unnecessarily be subject to repetitive litigation between the same parties and those in privity with them, in the absence of a compelling showing that the controlling laws, policies, or circumstances have changed, or unless other good cause is shown.[36] Thus, we agree with Alascom regarding the abstract proposition that *res judicata* should bar relitigation by the same parties of the issues already adjudicated on the merits in *Wright Schuchart*. However, we disagree with Alascom that the doctrine of *res judicata* bars applying that order as a precedent in other cases involving similar factual circumstances. Alascom had actual notice of *Wright Schuchart* and it may be cited as Commission precedent in an action against the company.[37] We note that, even though the complaints of only one customer (Arctic Slope) and of only one competitor (GCI) were before the Bureau at the time, Alascom was ordered to provide intra-Alaskan portions of interstate service at the interstate rates specified in its FCC tariff " . . . in accordance with *customers' and competitors'* requests." *Wright Schuchart*, slip op. at 5 (emphasis added). We conclude that *Wright Schuchart* applies as precedent to the extent that, as an adjudged case, it can serve as "an example or authority for an identical or similar case afterwards arising or a similar question of law."[38] The precedential value of the case, of course, is dependent upon the specific factual situation involved. Accordingly, with respect to the issue in paragraph 2(b) of the *Court Referral Order*, we conclude that *Wright Schuchart* is good law and serves as Commission precedent with respect to Alascom's characterization of interstate/intrastate services and the resulting application of its tariffs.[39]

44. We are unable, however, to find whether Alascom engaged in or attempted to engage in all of the conduct alleged in paragraph 27(e), (f), (g) and (i) of GCI's second amended antitrust complaint before the court since we do not have a sufficient evidentiary record on which to base a determination. Although *Wright Schuchart* found that Alascom knowingly violated section 202(a) of the Act, no findings were made there with respect to whether such unlawful conduct was the result of an anticompetitive intent on the part of Alascom officials and employees, or whether the violations had any anticompetitive effects. In order to consider the issue of whether forfeiture penalties should be imposed under section 202(c) of the Act, it was not necessary to establish that Alascom knew that it was acting unlawfully. Only a showing that it knew it was doing the acts in question -- in short, that the acts were not accidental -- was required.[40] Accordingly, various Alascom contentions that it had acted in good faith and not with any anticompetitive intent or motive were not addressed in adjudicating the section 202(a) issue.

45. Issues relating to anticompetitive intent are concerned primarily with alleged violations of federal antitrust statutes rather than of the Communications Act. In its request for declaratory ruling, GCI properly did not request that we resolve the disputed factual issue of Alascom's alleged anticompetitive intent. Such issue is not

necessarily one within the Commission's peculiar or special expertise and competence. Furthermore, as previously noted, we do not have a sufficient evidentiary record on which to resolve such issue. Accordingly, we do not reach any conclusion with respect to the factual issues concerning anticompetitive intent alleged in GCI's antitrust complaint before the court.

VI. PROVISION OF 1. 544 Mb / s SERVICE (ENF - 87 - 11)

A. *Introduction*

46. In this section, we consider the issues referred to by the court in paragraph 10 of its March 13, 1986 order, *viz.*

> (a) Alascom contends that the FCC should determine whether Alascom's response to GCI's requests for service, as alleged in paragraph 30 of the Second Amended Complaint, violated the Communications Act or FCC rules and policies.
>
> (b) GCI contends that Alascom's delay in the delivery of T-1 circuits ordered by GCI violates the antitrust laws. The legality of this delay under the antitrust laws will turn, at least in part, on Alascom's intent, a matter which is appropriate for consideration by the antitrust court. GCI urges the Commission to indicate its view that this issue is appropriate for determinati [sic] by the antitrust court in the first instance.[41]

In a petition filed April 3, 1986, GCI seeks declaratory rulings that: (a) the T-1 circuits it ordered from Alascom on February 8, 1985, and April 18 and 19, 1985, were all jurisdictionally interstate; (b) Alascom's refusal to initiate service promptly pursuant to its interstate tariff was unlawful under the *Show Cause Order* in *Wright Schuchart, supra* ; and (c) by its delay in filling GCI's orders, Alascom (1) engaged in an unjust and unreasonable practice in violation of section 201(b) of the Communications Act and (2) violated its duty pursuant to section 201(a) of the Act to furnish interstate communication service upon reasonable request.[42]

B. *Discussion*

47. The circuits ordered by GCI that are the subject of the instant questions were ordered on February 8 and April 18 and 19, 1985, "to be used to provide GCI's authorized interstate services" pursuant to Alascom's Tariff F.C.C. No. 1.[43] It is well established that interconnecting circuits that are used to provide interstate service are jurisdictionally interstate regardless of the physical location of the facilities involved.[44] Indeed, Alascom has admitted that those portions of interstate circuits involved in *Wright Schuchart* that were physically intrastate were all jurisdictionally interstate facilities.[45] Accordingly, we grant GCI's request for a declaratory ruling that the T-1 circuits it ordered from Alascom on February 8 and April 18 and 19, 1985, were all jurisdictionally interstate.

48. Although Alascom had taken the position that the tariff rates specified in its interstate tariff filed with the Commission were not applicable to such jurisdictionally interstate but physically intrastate circuits, the Common Carrier Bureau found that position to be without basis. *Show Cause Order* at para. 7, *enforced, Wright Schuchart.* The Bureau found that Alascom had violated section 202(a) of the Act by charging its competitor, GCI, intrastate rates for interstate service requirements of one of GCI's customers while charging its own customers lower interstate rates. Such decision was not appealed and thus became a final agency order and binding on Alascom.[46] Even though GCI had alleged that Alascom had violated section 201 as well as section 202(a) of the Act in *Wright Schuchart*, no findings were made whether the delay in not providing service until March of 1986 was the product of factors entirely beyond Alascom's control as it contends[47] or at least in part unjustified and violative of section 201 of the Act as GCI contends.

49. We have reviewed the pleadings and conclude that we are without an adequate record for the resolution of disputed factual issues such as the extent to which, if any, the delay in providing GCI the service it ordered was due to Alascom, GCI itself, other carriers such as AT&T and the local exchange carriers involved, or federal, state or municipal governmental agencies, or other factors beyond the control of Alascom. Even though Alascom's reliance on its contention that its interstate tariff was inapplicable was found unjustified in *Wright Schuchart*, it does not necessarily follow that Alascom also violated section 201 of the Act, particularly if its initial reasons for delay were not attributable solely to its erroneous contention that the interstate tariff was inapplicable. We note in this connection, *e. g.*, that although Alascom's February 27, 1985 response to GCI's February 8, 1985 order for service advised that a letter requesting Alascom to act as agent for GCI was required if GCI wished Alascom to order the necessary access facilities from local exchange carriers, GCI did not furnish such letters of agency until April 19, 1985, more than two months later and some two weeks after the *Wright Schuchart* order.[48]

50. Also, by letter dated May 2, 1985, Alascom advised GCI that it had not provided Alascom with technical information allegedly needed to engineer and design GCI's request for end-to-end service. Alascom suggested that a meeting be held between the parties in order to produce final answers to any additional questions.[49] Such meeting was not held until May 14, almost two weeks later. Further, by letter dated July 24, 1985, Alascom requested confirmation of GCI's orders for its digital service.[50] GCI's response that it still needed Alascom's service was dated August 8, 1985.[51]

51. Thus, at least some delays appear to have resulted from the need to clarify and firm up various and changing GCI requests for service. However, to the extent that Alascom seeks to justify any delay in filling GCI's requests for service pursuant to Alascom's interstate tariff offering on the basis of its contention that its state tariff was applicable and did not provide for such service, we would find such delay unreasonable and violative of sections 201(a) and 201(b) of the Communications Act. In the *Show Cause Order*, the Bureau found that Alascom could not lawfully apply intrastate charges to the physically intrastate portion of an interstate circuit. To have used such an excuse to justify the delay was therefore unreasonable.[52]

52. However, we are unable on this record to conclude that Alascom violated section 201 because it is not clear that other delays in providing the T-1 service were not also the result of factors beyond its control. Providing the end-to-end T-1 service required Alascom to coordinate with and obtain portions of the service from local ex-

change companies and AT&T. To come to an ultimate factual conclusion regarding whether the delays were ultimately unreasonable would require us to conduct a further fact-finding inquiry.[53] With regard to this instant proceeding, we do not believe this to be a wise use of our resources. Even if we were to conduct additional proceedings and conclude that Alascom violated section 201, that conclusion would not aid GCI in prosecuting its antitrust case since proof of a Communications Act violation does not necessarily prove a violation of the antitrust laws because a carrier can violate the Act without anticompetitive intent.[54] Since the question of intent still must be adjudicated in court, it would serve no purpose for us to conduct further fact finding in this regard.

C. *Conclusion*

53. In view of the foregoing, we grant GCI's request for a declaratory ruling that the T-1 circuits ordered by letters dated February 8 and April 18 and 19, 1985, to be used to provide authorized GCI interstate services were all jurisdictionally interstate. However, we are unable, on the basis of the pleadings before us, to make the other declaratory rulings under consideration in this section that GCI requested.

VII. REFUSAL TO ASSIGN NNX CODES TO GCI (ENF - 87 - 12)

A. *Introduction*

54. This section addresses GCI's petition for declaratory ruling filed on November 10, 1985, requesting that we find that Alascom's refusal to assign GCI an "NNX code"[55] was an unreasonable and unjust practice in violation of section 201(b) of the Communications Act and unlawfully discriminatory in violation of section 202(a) of the Communications Act, 47 U.S.C. §§ 201(b) and 202(a). GCI also asked that we rule that Alascom was not compelled by the Communications Act to refuse to make available to GCI a statewide three digit network access code (NNX) for GCI's use in its MTS/WATS-type services. As discussed below, we find that the Act and Commission policy do not compel Alascom to provide GCI an NNX code and GCI has not persuaded us that Alascom's refusal to provide it with an NNX code was unlawful.

B. *Background*

55. In 1982, GCI requested from ATU the assignment of an NNX code to permit customers in ATU's service area to access GCI's MTS-type services in the 907 Area Code or Number Plan Area (NPA). ATU responded that it did not control the assignment or use of NNX codes and referred GCI to Alascom.[56] Alascom, in turn, denied GCI's request on the following grounds:

> (a) NNX codes are assigned only to local operating telephone companies; the Alaska PUC had not certified GCI to provide local exchange services, nor had the FCC given GCI approval to provide interstate MTS/WATS-type services.[57]
>
> (b) The available NNX codes for Alaska were in short supply, and assignment of a whole exchange as requested by GCI would threaten to limit Alascom's ability to assign telephone numbers to local exchange carriers' customers in the future.

C. *Contentions of the Parties*

56. GCI contends that Alascom cited no Commission policy, rule or decision to support its refusal to assign GCI NNX codes. Moreover, it claimed that Alascom's stated reasons were inconsistent because it assigned such codes to itself as an interexchange carrier and to its affiliates. It further contends that Alascom has failed to justify its refusal on the question of the shortage of codes because it claims that, at the time of its request, only 234 out of a possible 640 NNX codes in Alaska were assigned.[58]

57. Alascom, on the other hand, contends that GCI's request must be denied because it has failed to show that Alascom had any legal obligation to provide GCI with an NNX code. It claims that, absent such a showing, GCI has not met its burden of persuasion and Alascom's denial of GCI's request cannot be found unreasonable or discriminatory.

D. *Discussion*

58. Since the basic function of the NNX code is to instruct switching machines in the local exchange system how to route incoming traffic,[59] the industry practice is to assign NNX codes only to local exchange carriers (LECs) or similarly situated entities. It is clear from the record that GCI has not been authorized as a LEC by the Alaska PUC and therefore has no apparent use for an NNX code absent a demonstration of specific need. GCI has claimed that its present form of interconnection to the local telephone system makes customer access cumbersome,[60] and places it at a competitive disadvantage vis-a-vis Alascom. It alleges that access to an NNX code will simplify the process and improve its competitive posture. We fail to see how an NNX code, which routes incoming traffic, would alleviate problems associated with access for outbound traffic, and GCI has offered no evidence in support of its contention. The problem raised by GCI is really one of equal access which has nothing to do with the provision of NNX codes.[61]

59. It is true that Alascom assigned certain NNX codes to itself and to its affiliates. However, it has only assigned such codes to affiliates who were functioning as LECs in those areas of Alaska where no actual LEC existed. The codes it assigned to itself were plant test codes used only in the maintenance and protection of access to the central processor of the Alascom toll switch, a function that is unique in Alaska to Alascom. In neither case did the assignment of an NNX code have to do with access to the outbound toll network. In sum, GCI has provided no evidence that it has a bona fide need for assignment of an NNX code. Therefore, we must conclude that, Alascom's refusal to assign GCI an NNX code was not unreasonable or unlawfully discriminatory under the circumstances, and it has not violated Sections 201(b) or 202(a) of the Act.

VIII. 32 Kbps DIGITAL PRIVATE LINE SERVICE (ENF - 87 - 13)

A. *Introduction and Background*

60. This section will address GCI's June 9, 1986, Request for Declaratory Rulings Relating to Alascom, Inc. Transmittal No. 352 Proposing New 32 Kbps Digital Private Line Service, which raises issues not referred by the court.[62] The specific 32 Kbps Digital Private Line issues addressed in GCI's request arose after the antitrust com-

plaint was filed. GCI explains, however, that its antitrust complaint includes allegations of Alascom's systematic anticompetitive pricing and manipulation and misrepresentation of its tariffs. (Para. 27 of the antitrust complaint.) Therefore, to assist the court in understanding the relevant regulatory issues, GCI requests rulings on the actions described in this request, which it contends are part of Alascom's pattern of anticompetitive activity.

61. In October 1985, Alascom filed Transmittal No. 352 with respect to its Tariff F.C.C. No. 1 in which it proposed a new 32 Kbps digital private line service between three cities in Alaska and Seattle, Washington. Alascom's proposed monthly rate for this service was $1,200 as opposed to the $2,700 monthly rate it was charging for its series 3002 voice grade circuits. GCI reviewed the supporting data Alascom filed with Transmittal No. 352, decided it was based on faulty and inconsistent assumptions, and in its letter of November 5, 1985, requested that the Commission review Alascom's proposal. The Common Carrier Bureau construed GCI's letter as a petition to suspend or reject, and since it was untimely as a petition, did not consider the letter in connection with its review of the tariff.[63] The Bureau allowed the tariff to go into effect. GCI now attacks the support data indirectly by requesting rulings on Alascom's obligations pursuant to section 61.38 of the Rules, 47 C.F.R. § 61.38, in providing the data. It seeks these rulings "to assist the Court in understanding the regulatory framework in which Alascom filed its tariff submission." Request at 4.

B. ***Contentions of the Parties***

62. GCI maintains that there were apparent deficiencies in Alascom's support data. Specifically, GCI asserts that Alascom did not have a reasonable basis: (1) for its projections that all 66 circuits between Alaska and Seattle would be sold and installed on the first day that service was available; (2) for its assumption that the new service would have no effect on other Alascom services; and (3) for its projection of the administrative and sales costs associated with its proposed services (approximately 5 percent of its total capital costs or a rate base adjusted cost of approximately 4 percent of capital costs). Moreover, GCI alleges that the tariff rate was in conflict with the Commission's prior decision rejecting Alascom's private line tariff for its Series 3002 or equivalent circuits between various cities in Alaska and Seattle, Washington (Tariff Bo. 7). There the Commission found that the proposed rates were not cost justified and were otherwise deficient. GCI notes that the rate of $1,200 for the 32 Kbps circuits is about half of the proposed $2,100 rate for the Series 3002 circuits (equivalent to 64 Kbps circuits) rejected by the Commission. Thus, GCI concludes that the 32 Kbps rates raise questions similar to those raised and decided against Alascom regarding the Series 3002 proposed rates. *Alascom, Inc.*, Tariff F.C.C. No. 7, Transmittal No. 244, FCC 85-346 (released July 10, 1985).

63. Accordingly, GCI requests the following rulings:

> (a) Alascom is a dominant carrier under . . . the FCC Rules and Regulations . . .[64] and thus its tariff filings must comply with Section 61.38 of the Rules and Regulations, 47 C.F.R. § 61.38.[65]
>
> (b) Alascom was required to follow Section 61.38 in connection with its transmittal No. 352 concerning 32 Kbps Digital Private Line Service.
>
> (c) If Alascom did not have a reasonable basis for its projections that all 66 circuits between the Alaska points and Seattle would be sold and installed on the first day that service is available, then Alascom's filing did not comply with Section 61.38 of the Commission's rules.
>
> (d) If Alascom did not have a reasonable basis for assuming that its service would have no effect on other Alascom services, then Alascom's filing did not comply with Section 61.38 of the Commission's rules.
>
> (e) If Alascom did not have a reasonable basis for projecting the administrative and sales costs of its proposed service, then Alascom's filing did not comply with Section 61.38 of the Commission's rules.

64. Alascom counters that its cost support data was reasonable and proper when filed and is still completely supportable. Moreover, it argues that section 61.38 is only an informational aid to the Commission, and may not be used as a weapon in regulatory and antitrust proceedings. Alascom maintains that the cost support data had already fulfilled the purpose of that section when the Commission reviewed the transmittal and rejected GCI's complaints, and the Commission should not extend the scope of section 61.38 now.

65. In answering GCI's specific attacks on its cost data, first Alascom contends that it did not base its projections on full utilization of all 66 circuits from day one of the service; its figures were offered as a one-year projection based on the prediction of Alascom's marketing personnel that 66 circuits would be in service one year after the service was initiated. According to Alascom, section 61.38 requires a projection based on "a representative 12 month period." It would be unreasonable to say that the start-up year is "representative" or that a new service must recapture all start-up costs in the first year.

66. As to its conclusion that the new 32 Kbps service would have no impact on its other services, Alascom claims that it was and is a reasonable belief. It explains that the new service was initiated partly to compete with GCI's identical service. According to Alascom, since 32 Kbps and Series 3002 services are not closely analogous, they would not attract the same customers. Therefore Alascom's new service would not draw customers away from its own Series 3002 service, but would attract new customers, either from GCI's 32 Kbps service or by stimulating new business.

67. Alascom states that it predicted its administrative costs based upon the levels used in other tariffs now in effect. This reflects the ratio of specified general administrative accounts to the entire private line base, and is a proper way to allocate overhead costs among many services. Finally, Alascom argues that the rejection of cost support in one tariff does not automatically denigrate cost support from a different tariff. It maintains that GCI's attempted analogy between 32 Kpbs service aBd the Series 3002 service is irrelevant since the offerings are based on two different technologies. It points out that the Commission's rejection of Tariff No. 7 was based on rate differentials among mileage bands, termination points, and circuit routings, factors not in issue with regard to 32 Kbps service. The 32 Kbps service, by contrast, is based on Alascom's 1.544 Mbps tariff which had been in effect for nearly two years.

68. In its reply, GCI emphasizes that it did not seek rulings from the Commission that Alascom's 32 Kbps tariff filing violated section 61.38, but merely sought rulings that would confirm that Alascom is a dominant carrier, and that " *if* Alascom did not have a reasonable basis in making its cost and customer projections, then it violated section 61.38 of the Commission's rules." GCI Reply at 2. GCI concludes that since Alascom ignored GCI's requested rulings, but instead sought to support its tariff transmittal in its reply, Alascom is effectively conceding all that GCI requested, namely, that *if* Alascom had no reasonable basis for its submissions, it violated section 61.38. In a supplemental filing GCI reports that it has taken the deposition of one of Alascom's managers and characterizes his testimony as contradicting Alascom's representation that its 32 Kbps service would not divert customers from existing services. GCI also notes that a year after the service was initiated, Alascom had significantly fewer circuits in use than it had predicted. In sum, according to GCI, although Alascom attempted to defend its conduct through blanket assertions of reasonableness and good faith, GCI determined, at least partially from depositions in the antitrust case, that Alascom's claim of reasonableness of the 32 Kbps tariff was unfounded.

69. In its reply to the supplemental filing, Alascom reiterates that its tariff filing was reasonable, argues that hindsight is not the proper test for evaluating the appropriateness of a sales projection, refutes GCI's allegation that Alascom's 32 Kbps service would draw customers from its other private line services, and requests that the Commission find that its tariff complied with the Commission's Rules and was based on reasonable projections.

C. *Discussion*

70. Initially, we again note that the issues raised in GCI's request for declaratory rulings pertaining to the 32 kbps private line service offering arose after the antitrust complaint was filed, and therefore these issues were not referred by the Court. However, although the specific issues were not alleged in the antitrust complaint, the issues of anticompetitive pricing and manipulation and misrepresentation of tariffs were related and, if the allegations were proven, they could bear on the misrepresentation issue. Therefore, we will address these issues even though they were raised subsequent to the filing of the court antitrust action.

71. Turning to the requested rulings, we find that the first two are uncontroversial. It is well established that Alascom is a dominant carrier[66] under section 61.12(c) of the Rules, and, as a dominant carrier whose annual gross revenues exceed $500,000, its tariff filings must comply with section 61.38 of the Rules. *See* 47 C.F.R. § 61.38(a). This of course included its transmittal concerning 32 Kbps Digital Private Line Service.

72. We decline, however, to address the other three requested rulings because the requests are based on false premises. GCI requests that we issue rulings that if Alascom did not have a reasonable basis for its cost projections submitted in support of its proposed new service, its filings did not comply with section 61.38 of the Rules. GCI has misconstrued the import of section 61.38. That section is only an informational aid to the Commission to assure that the carrier provides at least prima facie support for the tariff filing. *See Amendment of Section 61. 38 of the Commission's Rules*, 94 FCC 2d 1107 (1983). As we stated in that order:

> [T]he requirements of Section 61.38 are not intended to charter independent tariff oversight by third parties. This section exists primarily to assist the Commission in exercising its discretion whether to suspend and investigate proposed tariffs, rather than to confer "important procedural benefits upon individuals." [citations omitted]

Id. at 1109. If another party wishes to attack the basis underlying the projections in the tariff support data, it must do so in the context of an attack on the tariff itself. This may be in the form of a petition to suspend or reject a proposed tariff or, after the tariff is effective, a complaint as contemplated by section 208 of the Communications Act, 47 U.S.C. § 208, alleging that a tariff is unlawful, pursuant to sections 201(b) and/or 202(a) of the Act, 47 U.S.C. §§ 201(b) and 202(a).[67] However, a third party may not collaterally attack the section 61.38 material itself, as GCI is attempting to do in this request for declaratory ruling. GCI does not ask us to rule on the lawfulness of the rates themselves. Therefore, since we find the remaining basic premise behind GCI's request to be fallacious, we will not issue the three requested rulings regarding Alascom's compliance with section 61.38.

IX. ORDERING CLAUSES

73. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and 4(j) of the Communications Act, 47 U.S.C. §§ 154(i), 154(j), and section 1.2 of our Rules, 47 C.F.R. § 1.2, that the above-captioned requests for declaratory rulings of General Communication Incorporated ARE GRANTED to the extent reflected herein and otherwise ARE DENIED.

74. IT IS FURTHER ORDERED that a copy of this Memorandum Opinion and Order be transmitted forthwith to the Honorable John C. Coughenour, Judge, United States District Court for the Western District of Washington.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] General Communication Incorporated v. Alascom, Inc., No. C84-523 (W.D. Wash., filed Apr. 24, 1984) (*GCI v. Alascom*). AT&T and GCI subsequently reached a settlement of the portion of the suit against AT&T on March 20, 1985, and AT&T was dismissed as a defendant. Pacific Telecom, Inc., Alascom's parent, was later joined as a defendant. GCI seeks injunctive relief and treble damages under the antitrust laws, not damages pursuant to section 208 of the CommunicationsAct, 47 U.S.C. § 208.

[2] GCI v. Alascom, Inc., No. C84-523 (W.D. Wash., Aug. 26, 1985), *amended*, (Mar. 13, 1986) (*Court Referral Order*).

[3] Referral of Questions Regarding General Communication Incorporated v. Alascom, Inc., from the United States District Court for the Western District of Washington, Mimeo No. 4563 (released May 19, 1986).

[4] Two matters which were referred have already been resolved. General Communication Inc., FCC 87-269 (released Aug. 11, 1987); General Communication Inc. v. Alascom, Inc., FCC 86-202 (released May 2, 1986), *recon. den.*, 2 FCC Rcd 805 (1987). Two remaining issues, one dealing with sham pleadings and one dealing with a General Services Administration bid, will be dealt with in separate orders.

[5] Alascom's predecessor, RCA Alascom, took over the rights and obligations associated with that role in 1971 as purchaser of the largely undeveloped telephone system serving Alaska.

[6] General Communication, Inc., Memorandum Opinion, Order, Authorization and Certificate, Mimeo No. 001099 (released May 17, 1981).

[7] The issues as stated in the *Court Referral Order*, Paragraph 1, are as follows:

> (a) GCI contends the FCC should determine whether Alascom misapplied or misrepresented its WATS tariff provision.
>
> (b) The specific instances which GCI contends at this time are involved are identified below:
>
> (i) whether Alascom has engaged in a practice of charging customers in the Kenai-Soldotna area WATS rates rather than MTS rates, where such customers do not have a WATS access line and, if so, whether such practice is in compliance with Alascom's tariffs.
>
> (ii) whether Alascom has failed to charge customers the $30 monthly WATS access charge and, if so, whether such practice complies with Alascom's WATS tariff.
>
> (iii) whether Alascom has engaged in a practice of quoting WATS costs and charging WATS rates independent of the number of WATS lines ordered and, if so, whether such practice is consistent with Alascom's WATS tariff.
>
> (iv) whether Alascom proposed in March 1984 to the Hotel Captain Cook to replace GCI services with Alascom WATS services and, if so, whether such proposal was in compliance with Alascom's WATS tariff.

[8] General Communication Incorporated v. Alascom, Inc., FCC 86-202 (released May 2, 1986), *reconden.*, 2 FCC Rcd 805 (1987). The Commission concluded that the $30.00 charge was an Anchorage Telephone Utility (ATU) access fee, charged by Alascom on ATU's behalf, and not an Alascom charge, as GCI had alleged. Since under the Commission's access charge plan ATU was no longer entitled to charge this access fee, the charge should have been removed from Alascom's tariff. The Commission found that Alascom's failure to revise its tariff to remove the void $30.00 charge was a technical violation of section 201(b) of the Act. Because of mitigating circumstances, however, the Commission found that imposition of a forfeiture was not warranted. Slip op. at 6.

[9] Screening and blocking equipment prevents Out-WATS customers from using WATS lines to call into areas that have not been subscribed to or which are not included in the WATS offering.

[10] Alascom noted in Transmittal No. 143, Alascom Tariff F.C.C. No. 3 at 2 (May 5, 1978), that its Out-WATS service was provided conditioned upon the lack of screening and blocking, that there would be no way to prevent WATS subscribers from making non-WATS calls, and that Alascom would have to segregate billing information manually, giving credit for WATS calls.

[11] GCI does not purport to address the technical feasibility of using blocking and screening.

[12] GCI alleges in its reply that one Alascom customer, Greatland Seafood, had only one line. However, it submitted no evidence to support that allegation, nor did it submit any evidence to indicate that it was Alascom's practice to supply WATS service to customers with only one telephone line.

[13] GCI argues that Alascom's WATS tariff allows for only interstate calls, not international, intrastate, or local calls, and only over a dedicated "WATS access line." The tariff in question, however, merely provided for furnishing service "between a station associated with a WATS access line in Alaska and stations in specified service areas outside Alaska. . . ." Tariff F.C.C. No. 3, Section 2.1.1(A). This language cannot fairly be read to support GCI's assertion that this tariff section precluded the limited amount of MTS usage alleged to have occurred in the petition.

[14] *See* note 8, *supra*.

[15] *See* paragraph 5 and note 8, *supra*.

[16] MTS and WATS Market Structure, Third Report and Order, C.C. Docket No. 78-72, Phase I, 93 FCC 2d 241 (1983), *modified on reconsideration*, 97 FCC 2d 682 (1983) (First Reconsideration Order), *modified on further reconsideration*, 97 FCC 2d 834 (1984) (Second Reconsideration Order), *aff'd and remanded in part*, Nat'l Ass'n of Regulatory Comm'rs v. F.C.C, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 469 U.S. 1227 (1985), *modified on further reconsideration*, 49 Fed. Reg. 46383 (1984) (Third Reconsideration Order, Part I), 50 Fed. Reg. 18249 (1985) (Third Reconsideration Order, Part II), *aff'd on further reconsideration*, 50 Fed. Reg. 43707 (1985) (Fourth Reconsideration Order), *appeal docketed*, U.S. Telephone Inc. v. FCC, No. 84-1115 (D.C. Cir. Mar. 23, 1984), *appeal dismissed* (D.C. Cir., March 12, 1986).

[17] The complaint was filed March 21, 1985; Alascom's tariff was filed April 26, 1985, to become effective June 9, 1985.

[18] *See* MTS and WATS Market Structure, 93 FCC 2d at 279-80; First Reconsideration Order, 97 FCC 2d at 701-03.

[19] *See* MTS and WATS Market Structure, Second Reconsideration Order, 97 FCC 2d at 866-67 (1974).

[20] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, and CC Docket No. 78-72, Phase I, FCC 84-201 (released May 15, 1984), *recon. denied*, FCC 84-247 (released May 24, 1984).

[21] This question presented by GCI is phrased somewhat differently than that referred by the Court in its Order. The Court stated that the FCC should determine whether Alascom was compelled by the Act or Commission rule or policy to require GCI to obtain such price quotations in writing while others obtain such pricing information orally.

[22] Section 202(a) provides, in pertinent part, "that it shall be unlawful for any common carrier to make any unjust and unreasonable discrimination in . . . practices . . . in connection with like communication service . . . or subject any particular person . . to any undue or unreasonable disadvantage."

[23] GCI has admitted that its written requests for price quotations were responded to by Alascom in seven to ten days. No information was submitted to apprise the Commission of the legnth of time it normally takes to receive such quotations when requests are made orally, although there was evidence that on one occasion the response was immediate. GCI Petition, para. 5.

[24] In fact, the only example cited by GCI showed a six-day response time.

[25] Also before us are a reply filed by Alascom on June 9, 1986, a response filed by GCI on July 9, 1986, a letter from Stephen C. Warnath to William J. Tricarico (October 14, 1986) (transmitting a supplemental attachment to the request for declaratory ruling), a supplemental filing by GCI on August 3, 1987, and a response thereto filed by Alascom on September 2, 1987.

[26] Arctic Slope Wright Schuchart and General Communication Incorporated v. Alascom, Inc., Memorandum Opinion and Order, Mimeo No. 3627 (released April 4, 1985) (*Wright Schuchart* or Order).

[27] Arctic Slope Wright Schuchart v. Alascom, Inc., File No. IC 83-10030 (filed Sept. 20, 1983).

[28] General Communication Incorporatd v. Alascom, Inc., File No. IC 84-0435 (filed Oct. 12, 1983).

[29] Arctic Slope Wright Schuchart and General Communication Incorporated v. Alascom, Inc., Mimeo No. 6418 (released Sept. 7, 1984) (*Show Cause Order*), copy attached as *Appendix A*.

[30] *Wright Schuchart*, copy attached as *Appendix B*, at para. 2.

[31] *Id.*

[32] *Id.*

[33] *Id.* at 5. As an interim measure in response to Arctic Slope and GCI's complaints, Alascom had entered into the following agreements. Alascom and Arctic Slope agreed that Arctic Slope would continue to receive service from Alascom at interstate rates set out in Alascom Tariff F.C.C. No. 1 until the informal complaints regarding those rates were resolved by the Commission. Alascom and GCI reached an agreement providing that: (1) Alascom would resume installation of the interstate circuits ordered by GCI; (2) GCI would pay Alascom for the service in question according to the interstate rates set forth in Alascom Tariff F.C.C. No. 1; and (3) GCI would deposit the difference between Alascom's interstate and intrastate private line rates into an escrow account, the contents of which would be disbursed according to the Commission's resolution of the dispute.

[34] *Id.*

[35] Slip op. at 5.

[36] *See , e. g.*, Evans v. Monaghan, 306 N.Y. 312, 118 N.E. 2d 452 (1954); K.C. Davis, Administrative Law Text at 330 (1959); Annot., 79 A.L.R. 2d 1126, 1134 (1961).

[37] Under section 0.445(e) of the Commission's Rules, 47 C.F.R. § 0.445(e), unreported orders may be cited "against persons who have actual notice of the document." Alascom has admitted in this proceeding to have actual knowledge of these Orders.

[38] Black's Law Dictionary at 1059 (5th ed. 1979) (citing Empire Square Realty Co. v. Chase Nat. Bank of City of New York, 43 N.Y.S.2d 470, 473, 181 Misc. 752 (1943); Kvos, Inc. v. Associated Press, 299 U.S. 269, 279 (1936)).

[39] To the extent that GCI can show that the controlling law, policies and circumstances were the same with respect to any other customers or potential customers as they were with respect to Arctic Slope, we would render the same legal conclusions.

[40] *See , e. g.*, Midwest Radio-Television, Inc., 45 FCC 1137, 1141 (1963), and cases cited therein (construing the term "willful); U.S. Midwest Radio-Television, Inc., 249 F. Supp. 936, 937 (D. Minn. 1966) (where the court refused to permit recovery of a forfeiture because the violative act was neither intentional nor knowing but an accidental inadvertence).

[41] *Referral Order* at 9-10.

[42] Request for Declaratory Ruling of General Communication Incorporated Regarding Alascom's Improper Conduct Relating to the Provision of 1.544 Mb/s Service at 13-14 (April 3, 1986) (Request for Declaratory Rulings). Also before us are Alascom's response thereto filed on June 9, 1986, and GCI's reply filed on July 9, 1986.

[43] Request for Declaratory Rulings, Attachments E, F and G.

[44] *See , e. g.*, AT&T-Interconnections with Private Interstate Communications Systems, 71 FCC 2d 1, 8 (1979), and cases cited therein at 6-7, including, *inter alia*, AT&T Interconnections with Specialized Carriers in Furnishing Interstate FX and CCSA, 56 FCC 2d 14 (1975), *aff' d sub nom.* California v. FCC, 567 F.2d 84 (D.C. Cir. 1977), *cert. denied*, 434 U.S. 1010 (1978).

[45] *See Show Cause Order* at para. 4.

[46] *See* para. 42, *supra*.

[47] Reply of Alascom to GCI's Request for Declaratory Ruling Regarding 1.544 Mb/s Service at 1-2.

[48] Request for Declaratory Rulings, Attachments K and P.

[49] Request for Declaratory Ruling, Attachment L at 4.

[50] *Id.*, Attachment M.

[51] *Id.*, Attachment N.

[52] This delay was made especially unreasonable given that Alascom was urging that intrastate rates applied when in fact there were no effective state rates. We acknowledge that no final decision with respect to this alleged discrimination had been reached prior to the April 4, 1985 *Wright Schuchart* Order. Nevertheless, given the tenor of the September 1984 *Show Cause Order*, Alascom had fair notice that its attempt to apply intrastate rates was clearly unlawful.

[53] For instance, there was a dispute as to when Alascom ordered the necessary T-1 equipment. *See* Request for Declaratory Ruling at 11, Alascom's reply at 9, GCI reply at 26.

[54] As we understand it, GCI is trying to prove that the delays in providing T-1 service were anticompetitive under the antitrust laws, not that Alascom violated the Communications Act.

[55] An NNX code is the first three numbers of a typical seven-digit telephone number and thought of as the "telephone exchange" by the general public. It is, perhaps, more appropriately referred to as a Central Office code, because it instructs switching equipment to route incoming traffic to any of the seven-digit numbers within that exchange. The letter "N" generally represents a digit from 2 through 9 and the letter "X" represents any digit from 0 to 9. Depending on the sophistication of the central office equipment, the code can also be styled "NXX".

[56] The Consultative Committee for International Telephone and Telegraph (CCITT), a committee operating under the auspices of the United Nations, coordinates international numbering codes. Each nation establishes and manages its own national numbering plan. In the United States, prior to divestiture, this task was delegated by the government to AT&T. Since divestiture, this task has been entrusted to Bell Communications Research, Inc. (Bellcore) . Bellcore then delegates to the seven regional Bell Operating Companies, the Hawaiian Telephone Company, and, in this case, Alascom, the responsibility for assigning NNX codes in their respective areas.

[57] Because of our findings herein, it is irrelevant whether, or when, GCI received approval to provide MTS/WATS-type service.

[58] In view of the action taken herein, it is unnecessary to address this latter argument.

[59] Section 67.138(a)(1) of the Commission's Rules, 47 C.F.R. § 67.138(a)(1), reads in pertinent part: "A local dial switching entity is comprised of local dial central office equipment of the same type which has a common distributing frame, marker group, or other separately identifiable switching unit serving one or more prefixes (NNX codes)."

[60] A GCI customer would first have to dial a seven-digit local number to access the GCI system. After keying in an identification code, the GCI customer must then dial the ten digits of the called number.

[61] Although GCI raised this question in the antitrust suit in 1984, there had already been changes in the manner in which end users access interexchange carriers like GCI that will eventually solve GCI's problem. Pursuant to the Modification of Final Judg-

ment, United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983), the Bell Operating Companies were ordered to provide equal access to their customers. Equal access allows end users to reach an interexchange carrier by dialing only the digit 1 plus the number to be called. This type of access previously had been available only to AT&T. Equal access requirements were extended to all local exchange carriers, including Alaska companies, in MTS and WATS Market Structure, CC Docket No. 78-72, Phase III, 50 Fed. Reg. 15547 (April 19, 1985), *recon.*, FCC 86-4 (released January 8, 1986). While equal access has not been available until recently in most of the Alaska exchanges GCI serves, it was paying a non-premiumaccess charge (at 45% of the rate paid by Alascom) for this less than equal access interconnection.

[62] Also before us are Alascom's response filed on July 24, 1986, GCI's reply thereto filed on August 25, 1986, a supplemental filing by GCI on March 11, 1987, and Alascom's reply of March 24, 1987, to the supplemental filing.

[63] The tariff proposal was filed October 7, 1985, to go into effect November 22, 1985. GCI's November 5, 1985, letter was filed well after the 15-day cutoff period for filing petitions pursuant to section 1.773(a)(2) of the Commission's Rules, 47 C.F.R. § 1.773(a)(2).

[64] The petition cites section 61.15(a). Part 61 of the rules was amended in 1984, 49 Fed. Reg. 40869 (Oct. 18, 1984). A dominant carrier is now defined in section 61.12(c).

[65] Section 61.38 provides, *inter alia*, that dominant carriers whose annual gross revenues exceed $500,000 for the most recent 12-month period must submit cost data supporting either tariff changes or new tariff offerings.

[66] *See* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, Fifth Report and Order in CC Docket No. 79-252, 98 FCC 2d 1191, 1201, n.33 (1984), *recon. den.*, FCC 85-572 (released Nov. 20, 1985).

[67] Indeed, as noted above, GCI did review Alascom's Transmittal No. 352 filing and, concluding that the filing was faulty, requested that the Commission review the proposal. The Common Carrier Bureau construed GCI's letter as a petition to suspend or reject, found that it was untimely, and declined to give the letter any consideration in its review of the tariff. GCI therefore missed its opportunity to argue that the tariff should be suspended or rejected, and it did not file a complaint alleging that the tariff was unlawful.

APPENDIX A

Before the
Federal Communications Commission
Washington, D.C. 20554

ARCTIC SLOPE	IC 83-10030
WRIGHT SCHUCHART, and	IC 84-0435
GENERAL COMMUNICATION	
INCORPORATED,	
Complainants	
v.	
ALASCOM, INC.,	
Respondent	

ORDER TO SHOW CAUSE

Adopted: August 31 1984; Released: September 7, 1984

By the Chief, Common Carrier Bureau:

1. We have received informal complaints from Arctic Slope Wright Schuchart (Arctic Slope) and General Communication Incorporated (GCI) against Alascom, Inc. (Alascom) alleging that Alascom has required them to pay intrastate rates for interstate service, in violation of the Communications Act, the Commission's Rules and the provisions of Alascom's interstate private line tariff. Arctic Slope, a construction company, uses an interstate private line network for communications among its headquarters in Anchorage, Alaska, various construction sites within Alaska, and Seattle, Washington. Arctic Slope originally received private line service from Alascom at interstate rates. Shortly before September 19, 1983 (the date Arctic Slope filed its informal complaint), however, Arctic Slope decided to obtain the Anchorage-Seattle link from GCI, a satellite common carrier operating between points in Alaska and the 48 contiguous states. GCI offers interstate private line service using a combination of its own facilities and circuits ordered from Alascom.

2. Arctic Slope complains that soon after it decided to obtain the Anchorage-Seattle link from GCI, Alascom gave Arctic Slope written notice that the intra-Alaskan portion of Arctic Slope's interstate service would be terminated unless Arctic Slope agreed to pay for that service at intrastate rates rather than the lower interstate rates. GCI alleges that, at about the same time, it was informed that Alascom would refuse to install circuits needed to provide service to Arctic Slope and GCI's other customers until GCI agreed to pay Alascom intrastate rates for service which GCI was then getting at the interstate rates.

3. Arctic Slope and GCI contend that the portion of their private line service provided by Alascom, although physically intrastate, is part of an interstate circuit and that, under the Communications Act and case law, such service is considered jurisdictionally interstate. Therefore, they argue, Alascom must continue to charge its customers interstate, and not intrastate, rates for these portions of the complainants' circuits. Arctic Slope and GCI also contend that Alascom's requirement that they pay intrastate rates for interstate circuits, while other customers are charged interstate rates for the same service, constitutes unjust and unreasonable discrimination in violation of Sections 201 and 202(a) of the Communications Act, 47 U.S.C. §§201 and 202(a). Further, Arctic Slope argues that Alascom's increase in rates is intended to penalize it for taking service from GCI.

4. In response to Arctic Slope's complaint, Alascom admits that those portions of interstate circuits which are physically intrastate are jurisdictionally interstate. Alascom argues, however, that its interstate private line tariff, Alascom Tariff p.C.C. No. 1, is not applicable to the service requested by Arctic Slope because it filed that tariff expecting to be the sole provider of interstate service between Alaska and the 48 contiguous states. As a result, Alascom continues, the rates in that tariff are based on an averaged cost of service and the tariff does not include language permitting the charging of interstate rates for portions of interstate circuits provided by competing carriers. Alascom maintains that since it does not presently have an applicable interstate private line tariff on file, it

must provide Arctic Slope with service under its intrastate private line tariff. Finally, Alascom states that because it will be filing with the Commission a new interstate private line tariff which will remedy the problems noted by Arctic Slope, the Commission should not act on the informal complaint.

5. After we received Alascom's response, Alascom and Arctic Slope reached an agreement which provides that Arctic Slope will continue to receive service from Alascom at the interstate rates set out in Alascom Tariff No. 1 until the Commission resolves the issues presented by the informal complaints. Alascom did not file a response to GCI's informal complaint. Instead, Alascom and GCI also reached an interim agreement providing that: (1) Alascom would resume installation of the interstate circuits ordered by GCI; (2) GCI would pay Alascom for the service in question according to the interstate rates set forth in the Alascom Tariff No. 1; and (3) GCI would deposit the difference between Alascom's interstate and intrastate private line rate into an escrow account, the contents of which would be disbursed according to the Commission's resolution of the dispute.

6. Alascom filed a new interstate private line tariff, Alascom Tariff F.C.C. No. 7 on January 18, 1984. This tariff was to provide rates for physically intrastate portions of jurisdictionally interstate private line service, thus disposing of Arctic Slope and GCI's complaints. The Commission, however, rejected the proposed tariff because it lacked cost support data and its language was unclear. *In the Matter of Alascom Tariff F.C.C. No. 7, Transmittal No. 244* , Mimeo No. 4832, released June 18, 1984. At present both Arctic Slope and GCI continue to receive interstate private line service pursuant to their respective agreements with Alascom.

7. As an initial matter, we have examined Alascom's interstate private line tariff, Alascom Tariff No. 1, and have found no language barring that tariff's application to the Alascom-provided intrastate portions of interstate circuits used by its competitors. Second, given Alascom's recognition that an intrastate circuit used in providing interstate service is jurisdictionally interstate, Alascom has not justified its decision to apply rates under its intrastate tariff for portions of interstate circuits, rather than rates under its interstate tariff. Therefore, Alascom's Tariff F.C.C. No. 1 is applicable to service provided to competitors and customers of competitors. Although Alascom argues that it cannot provide service to Arctic Slope and GCI, it nevertheless has continued to offer its other competitors intrastate portions of interstate circuits at the interstate rates set forth in Tariff No. 1. Without a satisfactory explanation of this inconsistent application of its state and federal tariffs, Alascom's discrimination against customers choosing a competitor's service appears to be unjust and unreasonable in violation of Section 202(a) of the Communications Act. Alascom's stated intention to file with the Commission an acceptable interstate private line tariff does not relieve it of the responsibility to comply with the Communications Act, the Commission's Rules and its own tariff.

8. Accordingly, IT IS ORDERED, pursuant to the authority of 47 U.S.C. §§4(i), 205(a) and 403 and 47 C.F.R. §§0.291 and 1.701, that Alascom Inc., is hereby directed to SHOW CAUSE why it should not be required to provide Arctic Slope Wright Schuchart and General Communication Incorporated intra-Alaskan portions of interstate service at the interstate rates specified in Alascom, Inc.'s Tariff F.C.C. No. 1, and why it should not be subject to penalties under 47 U.S.C. §202(c) for knowingly and unlawfully discriminating in the application of rates for service to customers in violation of 47 U.S.C. §202(a).

9. IT IS FURTHER ORDERED that answers must be filed as provided in Section 1.701(b) of the Commission's Rules, 47 C.F.R. §1.701(b), within five working days of the release of this order.

FEDERAL COMMUNICATIONS COMMISSION

Jack D. Smith
Chief, Common Carrier Bureau

APPENDIX B

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ARCTIC SLOPE and	IC 83-10030
WRIGHT SCHUCHART	IC 84-0435
GENERAL COMMUNICATION INCORPORATED,	
Complainants	
v.	
ALASCOM, INC.,	
Respondent	

MEMORANDUM OPINION AND ORDER

Adopted: April 1, 1985; Released: April 4, 1985

By the Chief, Common Carrier Bureau:

1. In *Arctic Slope Wright Schuchart and General Communication Incorporated v. Alascom, Inc.* , Mimeo No. 6418, released Sept. 7, 1984 *(Show Cause Order*), we directed Alascom, Inc. (Alascom) to show cause why it should not be required to provide Arctic Slope Wright Schuchart (Arctic Slope) and General Communication Incorporated (GCI) intra-Alaskan portions of interstate service at the interstate rates specified in Alascom's Tariff F.C.C. No. 1, and why it should not be subject to penalties under Section 202(c) of the Communications Act, 47 U.S.C. § 202(c), for knowingly and unlawfully discriminating in the application of rates for service to customer, in violation of Section 202(a) of the Act, 47 U.S.C. § 202(a).

2. After reviewing Alascom's response to our *Show Cause Order* , we hereby affirm our prior finding that Alascom's interstate private line tariff, Alascom, Inc. Tariff F.C.C. No. 1, contains no language oarring its application to the Alascom-provided physically intrastate portions of interstate circuits used by its competitors. In addition, we

find that Section 1.1.4 of Tariff F.C.C. No. 1 does not meet the clarity requirements of Section 61.2 of the Commission's Rules, 47 C.F.R. § 61.2, and should be revised to remove any doubt that this tariff applies to private line service from points in Alaska to points in the United States through interconnection with other carriers. We also conclude that Alascom has not justified applying intrastate tariff rates for portions of interstate circuits, rather than interstate tariff rates. Alascom, therefore, has violated Section 202(a) of the Communications Act, 47 U.S.C. § 202(a) by unjustly discriminating in the application of intrastate rates for interstate service to Arctic Slope and GCI.

I. BACKGROUND

3. Our *Show Cause Order* was issued in response to informal complaints filed by Arctic Slope and GCI which alleged that Alascom had required them to pay intrastate rates for interstate service, in violation of the Communications Act, the Commission's rules and the provisions of Alascom's interstate private line tariff. Arctic Slope, a construction company, uses an interstate private line network for communications among its headquarters in Anchorage, Alaska, various construction sites within Alaska and Seattle, Washington. Arctic Slope originally received private line service from Alascom at interstate rates. When Arctic Slope decided to obtain the service between Anchorage and Seattle from GCI, a satellite common carrier that offers private line service between points in Alaska and the 48 contiguous states, Alascom gave Arctic Slope written notice that the intra-Alaskan portion of its interstate service would be terminated unless Arctic Slope agreed to pay for that service at higher intrastate rates. At the same time, GCI alleged that Alascom informed it that Alascom would refuse to install circuits needed to serve Arctic Slope until GCI agreed to pay Alascom intrastate rates for service which GCI had previously been provided at interstate rates. Both complainants contended that Alascom's requirement that they pay intrastate rates for interstate circuits, while other customers are charged interstate rates for the same service, constitutes unjust and unreasonable discrimination in violation of Sections 201 and 202(a) of the Communications Act, 47 U.S.C. §§ 201 and 202(a).

4. As an interim measure in response to these complaints, Alascom entered into the following agreements. Alascom and Arctic Slope agreed that Arctic Slope would continue to receive service from Alascom at interstate rates set out in Alascom Tariff F.C.C. No. 1 until the informal complaints regarding those rates were resolved by the Commission. Alascom and GCI reached an agreement providing that: (1) Alascom would resume installation of the interstate circuits ordered by GCI; (2) GCI would pay Alascom for the service in question according to the interstate rates set forth in Alascom Tariff F.C.C. No. 1; and (3) GCI would deposit the difference between Alascom's interstate and intrastate private line rates into an escrow account, the contents of which would be disbursed according to the Commission,s resolution of the dispute.

5. In response to our *Show Cause Order* , Alascom has set forth the following arguments which rely on and incorporate by reference Alascom's response to Arctic Slope's informal complaint (October 31, 1983) and a letter from Alascom's counsel to the Commission (December 15, 1983). Alascom did not respond to GCI's complaint. First, Alascom reiterates its position that Alascom's interstate private line tariff does not have rates applicable to provision of intra-Alaska circuits, whether or not connected to interstate segments furnished by others. Alascom states that the language in the "Application of Tariff section (Section 1.1.4), was drafted long before the entry of competition into Alaska and, therefore, the tariff did not contemplate intra-Alaskan circuits interconnecting with competitor-owned circuits. Second, Alascom asserts that the offering of intra-Alaska interstate service under its intrastate tariff (Tariff A.P.U.C. No. 98) was a more desirable alternative than not offering the service at all until a revised interstate private line tariff went into effect.[1] Finally, Alascom contends that it did not discriminate with respect to other competitors or other customers in providing intrastate portions of interstate circuits at intrastate rates.

II. DISCUSSION

6. After careful review of Alascom's response to our *Show Cause Order* , we find that Alascom has failed to justify its position that Alascom Tariff F.C.C. No. 1 should not be applied to the intra-Alaskan portions of the interstate service requested by Arctic Slope and GCI. All parties agree that the circuits involved in this dispute are jurisdictionally interstate.[2] Throughout this dispute with GCI and Arctic Slope, Alascom has continued to offer and provide physically intrastate portions of interstate circuits at interstate rates to its own customers.[3] Furthermore, Alascom is required by Commission order to "provide interconnection arrangements to a carrier holding a valid Section 214 authorization, upon appropriate request."[4]

7. Alascom's assertion that its Tariff No. 1 contains no applicable rates for intrastate portions of interstate circuits is erroneous. We find that Alascom Tariff F.C.C. No. 1 does apply to such service when provided to other carriers and to customers of those carrier. As discussed below, this tariff contains no language that can be construed to the contrary.

8. The title page of the tariff plainly states that it contains "Telecommunications Services, Regulations and Schedules of Charges applying to interstate service from Points in Alaska to Points in the United States." Examination of the tariff's title page discloses that it contains no explicit statement that the rate schedule shall not apply to the physically intrastate portions of interstate service provided by other carriers. Section 1.1.4, last updated in 1971, delineates the application of the tariff to "Private line service from points in Alaska to the United States through interconnection with AT&T or WU." While it does not cite interconnection with additional carriers, nowhere does the language expressly exclude interconnection with other carriers. Since the language is ambiguous, we shall construe she tariff to allow such interconnection. Section 1.1.4 fails to satisfy the standard for clarity set forth in Section 61.2 of the Commission's Rules, 47 C.F.R. § 61.2.5 This section must be revised promptly to clarify that private line service is available from points in Alaska to the United States through interconnection with other carriers.[6]

9. Alascom Tariff F.C.C. No. 1 Sections 6.1.1(A), b.1.6(A), 6.2.2(A), 6.2.4(B) and 6.2.4(G)(1) are also applicable to the interstate private line service in question before us. Sections 6.1.1(A) and 6.1.6(A) define the scope of private line service and its connection with other facili-

ties. Sections 6.2.2(A), 6.2.4(B) and 6.2.4(G)(1) set forth the rates based on mileage measurements for each section of an interexchange channel between points in Alaska and points in the continental United States.

10. Alascom's argument that it could offer the designated service at intrastate rates under its Tariff A.P.U.C. No. 98, or not at all until a more appropriate tariff goes into effect, is not valid. Since Alascom has an applicable interstate private line tariff in effect, we see no reason why rates contained in that tariff should not now be applied to intra-Alaskan circuits used by Arctic Slope and GCI. Alascom's further contention that it does not provide other customers with intrastate portions of interstate circuits at interstate rates is not accurate as it provides its own customers with such service at the interstate rates contained in its Tariff F.C.C. No. 1.

11. We find, therefore, that when Alascom refused to install the requested circuits until GCI and Arctic Slope agreed to pay intrastate rates for this service, it violated Section 202(a) of the Communications Act, 47 U.S.C. § 202(a) by knowingly and unlawfully discriminating in the application of rates for service to these customers. Alascom discriminated by charging its competitor intrastate rates for interstate service while charging its own customers the lower interstate rates. We have concluded, however, that it is not necessary to impose penalties upon Alascom, Inc. under Section 202(c) or the Communications Act, 47 U.S.C. § 202(c), in this case because the agreements entered into by Alascom with Arctic Slope and GCI removed any danger that Arctic Slope or GCI would suffer any financial harm as a result of Alascom's actions during the pendency of this proceeding.

III. ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to the authority of Sections 4(i), 205(a) and 403 of the Communications Act, 47 U.S.C. §§ 154(i), 205(a) and 403, and Sections 0.291 and 1.701 of the Commission,s Rules, 47 C.F.R. §§ 0.291 and 1.701, that Alascom, Inc. shall at once provide intra-Alaskan portions of interstate service at the interstate rates specified in Alascom, Inc.'s Tariff F.C.C. No. 1, in accordance with customers' and competitors' requests.

13. IT IS FURTHER ORDERED that the disputed amount (the monetary difference between rates and charges in Alascom, Inc. Tariff F.C.C. No. 1 and Tariff A.F.U.C. No. 98) held in the escrow account, pursuant to the Alascom and GCI agreement of November 17, 1983, shall be disbursed to General Communication Incorporated within 30 days of the effective date of this Order.

14. IT IS FURTHER ORDERED that the informal complaints filed by Arctic Slope Wright Schuchart and General Communication Incorporated are DEEMED SATISFIED by the actions prescribed in this Order and no further action will be taken.

15. IT IS FURTHER ORDERED that this Order is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Albert R Halprin
Chief, Common Carrier Bureau

FOOTNOTES

[1] Alascom filed a new interstate private line tariff, Alascom Tariff F.C.C. No. 7, on January 18, 1984. This tariff provided, *inter alia*, rates for physically intrastate portions of jurisdictionally interstate private line service. The Commission rejected the proposed tariff because the coat support data submitted was substantially deficient and the tariff language was unclear. In the Matter of Alascom Tariff F.C.C. No. 7, Transmittal No. 244, Mimeo No. 4832 (released June 18, 1984).

[2] Alascom acknowledged this fact in its Response to the Arctic Slope informal complaint, Oct. 31, 1983 at 5. It is well established by precedent that interconnecting circuits that provide interstate service are jurisdictionally interstate regardless of the physical location of the facilities involved. See American Telephone and Telegraph Company -Interconnection with Private Interstate Communications Systems, 71 FCC 2d 1, 6-7 (1979).

[3] In the *Show Cause Order* at para. 7, a reference was made to Alascom's offering of intrastate portions of interstate circuits at interstate rates to competitors other than GCI. This reference to "competitors" should have been to -customers" because Alascom did not have competitors other than GCI during the tine period of the dispute.

[4] *See* MTS-WATS Market Structure Inquiry, CC Docket No. 78-72, Phase II, Second Report and Order, 92 FCC 2d 787, 845 (1982). This interconnection requirement applies to all carriers including those designated as forborne in the Competitive Carrier Rulemaking, CC Docket No. 79-252. Pursuant to the Fourth Report and Order in CC Docket No. 79-252, 95 FCC 2d 554 (1983), forborne carriers are no longer required to obtain prior line-specific approval under Section 214 of the Communications Act, 47 U.S.C. § 214.

[5] Section 61.2 of the Commission's Rules, 47 C.F.R. § 61.2, states:

> In order to remove all doubt as to their proper application, all tariff publications must contain clear and explicit explanatory statements regarding the rates and regulations.

[6] *See* para. 6 and note 4, *supra* .

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of
Citizens for a Humane Kansas

against

KWCH-TV
Hutchinson, Kansas

ORDER

Adopted: January 29, 1988; Released: February 17, 1988

By the Commission:

1. The Commission has before it an application for review, filed by Citizens for a Humane Kansas (Citizens), of the Mass Media Bureau's March 25, 1987, ruling, a copy of which is attached. The Bureau denied Citizen's Fairness Doctrine complaint against station KWCH-TV, Hutchinson, Kansas.

2. After a careful review of the complaint, we believe that the Bureau's ruling was correct, and that the application for review does not contain sufficient grounds to warrent reversal or modification.

3. Therefore, pursuant to Section 1.115(g) of the Commission's rules, the application for review IS DENIED.[1]

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTE

[1] During the pendency of this matter, in an action taken on August 4, 1987, pursuant to a remand by the United States Court of Appeals for the District of Columbia Circuit in *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987), the Commission found "that the Constitution bars [the Commission] from enforcing the Fairness Doctrine . . " *Syracuse Peace Council* v. WTVH, 2 FCC Rcd. 5043 (1987). That decision did not, however, consider the application of the Fairness Doctrine in contexts involving ballot issues. Id. at 5063 n.75. Because we find that the staff appropriately denied the complaint on the merits, we need not decide the ramifications of Syracuse Peace Council in the context of a ballot issue.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Routine Licensing of Earth Stations
in the 6 GHz and 14 GHz Bands Using
Antennas Less than 9 Meters and 5
Meters in Diameter, Respectively,
for Both Full Transponder and
Narrowband Transmissions

Petitions for Reconsideration and
for Clarification

MEMORANDUM OPINION AND ORDER

Adopted: January 5, 1988; Released: February 17, 1988

By the Chief, Common Carrier Bureau:

1. Satellite Transmission and Reception Specialist Company (STARS) requests partial reconsideration and clarification and Hughes Communications Galaxy, Inc. (HCG) requests reconsideration of *Routine Licensing of Small Earth Stations*, 2 FCC Rcd 2149 (1987) (*Declaratory Order*). For the reasons discussed below, the petitions are denied.

2. In the *Declaratory Order*, we established power levels into certain small domestic fixed-satellite earth stations that, if not exceeded, would permit applications for these stations to be routinely processed. These earth stations were defined as those employing antennas less than 9 meters in diameter in the 6 GHz (*i. e.*, 5.925-6.425 GHz) band and less than 5 meters in diameter in the 14 GHz (*i. e.*, 14.0-14.5 GHz) band. Maximum power levels for routine processing of applications for these antennas were specified at 26.5 dBW for full transponder service at 6 GHz, 27.0 dBW for full transponder service at 14 GHz, and -8.0 dBW/4 KHz for single channel per carrier (SCPC) analog communications at 14 GHz into a 1.2 meter or larger antenna operating with a maximum transmitted satellite carrier power density of 13.0 dBW/4 KHz. Proposed earth stations that do not exceed those power levels are deemed compliant with *American Broadcasting Companies* [1] and *Reduced Orbital Spacing*,[2] and applicants are relieved from making the technical analysis required by these orders demonstrating that the earth station will not cause harmful interference under conditions of 2° orbital spacing. By setting these standards and eliminating the need to review each application on a case-by-case basis, we were able to expedite processing on approximately 250 small antenna applications then on file. Applications proposing earth stations not meeting these standards would continue to be processed on a case-by-case basis.

3. In its petition, STARS states that it currently holds developmental licenses for 6 GHz transportable earth stations using antennas smaller than 9 meters and operating at power levels greater than the 26.5 dBW ceiling delineated in the *Declaratory Order*.[3] STARS argues that prior to the issuance of the *Declaratory Order*, its transportables were routinely licensed on a developmental basis and annual renewals of these licenses were routinely granted. Accordingly, STARS requests that we either defer the effective date of the 26.5 dBW power level ceiling for small 6 GHz transportable earth stations or clarify that non-conforming stations covered by developmental licenses will still be eligible for annual renewal on a routine basis.

4. The *Declaratory Order* was issued to define the terms and conditions under which applications for certain small domestic-fixed earth stations will be routinely processed. The *Declaratory Order* did not address transportable earth stations which are authorized separately under developmental licenses. Transportable earth stations, such as STARS's, will continue to be authorized under existing criteria. [4] Thus, STARS's concerns regarding its transportable earth stations are inapposite and its petition is denied.

5. HCG seeks reconsideration of the *Declaratory Order* or, in the alternative, requests that we defer the *Declaratory Order's* effective date pending the outcome of the Commission's current Part 25 Rule Making proceeding.[5] HCG states that the *Notice of Proposed Rule Making* (*NPRM*) in that proceeding addresses the same issues that are addressed in the *Declaratory Order*. Specifically, HCG argues that the Commission has adopted standards for power density levels for small antennas different from those proposed in paragraph 50 of the *NPRM* before it has had the opportunity to consider public comment on the *NPRM* proposal; that the *Declaratory Order* does not present a detailed analysis of the interference potentials of the power levels authorized in it; and that the *Declaratory Order* fails to address various kinds of adjacent satellite interference that may be exacerbated by certain small 14 GHz band earth stations.

6. First, contrary to HCG's assertion, the power density standards discussed in the *NPRM* did not refer to the same types of power density standards addressed in the *Declaratory Order*. The standards on which comments were invited in the *NPRM* were those adopted in previous declaratory orders for small antennas providing digital SCPC services -- i.e., -2.7 dBW/4 KHz in the 6 GHz band and -14.0 dBW/4 KHz in the 14 GHz band --as indicated in the cited cases accompanying the proposal.[6] We will, however, consider any comments HCG has filed with respect to standards for antennas employing full transponder transmissions and analog SCPC transmissions in the context of the Part 25 proceeding.

7. We also note that setting standards for the routine processing of applications without first soliciting comment was a proper exercise of our discretion.[7] The standards enunciated in the *Declaratory Order* were intended to allow us to begin routine processing of approximately 250 applications then on file that were not encompassed by previous declaratory orders. As noted, the Commission has previously issued several orders setting standards allowing it to process routinely applications for small antennas providing narrowband SCPC services.[8] These orders were issued to permit us to act expeditiously on applications for these facilities without having to evaluate each on an individual basis. Similarly, the *Declaratory Order* at issue here adopted standards to permit routine processing of certain types of applications. Specifically, standards were adopted for stations employing full, rather than narrowband, transponder transmissions and those employing analog, rather than digital, SCPC transmissions in the 14

GHz band.[9] Moreover, many of these facilities were already operating pursuant to special temporary authority at power levels identical to those specified in the *Declaratory Order*. No cases of interference from any of these stations had been reported. Thus, we reject HCG's assertion that we were required to consider comments filed in response to the *NPRM* when issuing the *Declaratory Order*.

8. HCG further argues that the *Declaratory Order* does not present a detailed analysis of the interference potentials of the power levels that are authorized. As discussed in the *Declaratory Order*, however, the Commission performed a detailed interference analysis using updated matrices of the representative r.f. carriers originally released to the public in Appendices B and C of *Reduced Orbital Spacing*. The updated r.f. matrices included the most recent proposed satellites and communications services. On the basis of the analyses performed using the updated matrices, power limits were specified for routine processing of small antennas providing full transponder services in both the 6 GHz and 14 GHz bands and analog SCPC services in the 14 GHz band. While the matrices and staff calculations were not reproduced in the *Declaratory Order*, the results were described in the *Declaratory Order*. Moreover, the matrices are available to the public.[10] Thus, we find that the interference potentials of the power levels authorized in the *Declaratory Order* were sufficiently supported with a comprehensive analysis.

9. Finally, HCG argues that the 14 GHz power levels specified in the *Declaratory Order* may not be sufficient to address all of its concerns regarding increased interference. HCG has filed comments discussing these concerns in response to the Part 25 *NPRM* and its views will be considered in that proceeding. Thus, HCG's petition for reconsideration of the *Declaratory Order* is denied.

CONCLUSION AND ORDERING CLAUSES

10. The *Declaratory Order* was intended only to permit the Commission to begin to process, on a routine basis, certain categories of applications for approximately 250 small antenna applications that did not fall within the scope of previous declaratory orders. Proposed earth stations not meeting the standards established in the *Declaratory Order* would still be processed, although the technical showing required by *American Broadcasting Companies* and *Reduced Orbital Spacing* would be required for each station. If commenters present convincing evidence to do so, these standards may be revised in the context of the Part 25 Rule Making.

11. Accordingly, IT IS ORDERED that Satellite Transmission and Reception Specialist Company's and Hughes Communications Galaxy, Inc.'s petitions for reconsideration of Routine Licensing of Small Earth Stations, 2 FCC Rcd 2149 (1987) ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] American Broadcasting Companies, 62 FCC 2d 901 (1977).

[2] Licensing of Space Stations in the Domestic Fixed-Satellite Service, 54 Rad. Reg. (P&F) 2d 577 (1983), *recons. in part*, 99 FCC 2d 737 (1985) (hereinafter *Reduced Orbital Spacing*).

[3] The Commission issues developmental licenses for 6 GHz transportable earth station antennas as small as 4.5 meters. *See* Western Tele-Communications, Inc., Mimeo No. 3640 (released September 30, 1981), *recons. in part*, Mimeo No. 5974 (released August 27, 1982); and American Telephone and Telegraph Company, Mimeo No. 5974 (released August 27, 1982).

[4] We note that in our current Part 25 Rule Making proceeding, we have proposed technical and other criteria for transportable earth stations. *See* Notice of Proposed Rule Making, Amendment of Part 25 of the Commission's Rules and Regulations, 2 FCC Rcd 762 (1987).

[5] *Id.*

[6] *Id.* at footnote 54.

[7] *See* Section 1.2 of the Commission's rules and regulations, which allows us to issue declaratory rulings on our own motion as a means of removing uncertainty. 47 C.F.R. § 1.2.

[8] *See* Routine Licensing of Earth Stations in the 6 GHz Band Using Antennas Less than 9 Meters in Diameter for Narrowband Transmissions, 50 Fed. Reg. 40019 (October 1, 1985); Routine Licensing of Large Networks of Small Antenna Earth Stations Operating in the 12/14 GHz Frequency Bands, 51 Fed. Reg. 15067 (April 22, 1986).

[9] We note that the joint government-industryadvisory committee established to study and develop proposals to implement 2° spacing did not include any specific recommendations concerning these types of facilities in its Phase II Final Report. The Declaratory Order therefore permitted us to begin processing the hundreds of applications for these facilities in a timely manner.

[10] The Commission has provided over 24 copies of its matrices to those who have requested copies and have supplied blank tape cassettes. These copies are made available so that interference results can be analyzed using common communication system parameters and performance objectives.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-10

In the Matter of

Provision of Access for 800 Service — RM 5101

SUPPLEMENTAL NOTICE OF PROPOSED RULE MAKING

Adopted: February 2, 1988; Released: February 18, 1988

By the Commission:

I. INTRODUCTION

1. On January 14, 1986, we adopted a Notice of Proposed Rule Making[1] *(Notice)* to consider the long-term obligations of local exchange carriers (LECs) under the Communications Act of 1934, as amended, (the "Act)[2] to provide access services to interexchange carriers (IXCs) for their provision of 800 service. [3] We tentatively concluded in the *Notice* that the "data base plan" of 800 access being developed by the Bell Operating Companies (BOCs) and other LECs was substantially superior to other forms of 800 access and that we should require its implementation.

2. Although the parties filing comments generally supported implementation of the data base plan, they did not address all of the specific issues raised in the *Notice*. Moreover, subsequent to the formal closing of the record, certain new issues have been raised as to the desirability of the data base plan, or certain features of it, and the manner in which the BOCs and other LECs will implement and charge for this form of 800 access service. Accordingly, we issue this Supplemental Notice of Proposed Rule Making *(SupplementalNotice)* seeking comment and information on the following issues: (1) the projected costs of the data base plan and the effect its implementation would have on the costs of interstate 800 service; (2) the benefits of each of the 800-related services that the BOCs propose to offer with their data base systems; (3) the desirability, assuming we find the data base plan to be in the public interest, of requiring LECs to participate in the plan or of taking action to facilitate participation of small independent telephone companies (ITCs); (4) the desirability and feasibility of retaining the NXX system of 800 access in conjunction with the data base plan; (5) the post-dialing delays associated with data base access and the desirability and feasibility of requiring that a limited NXX option continue to be available after implementation of the data base plan so that certain subscribers may avoid such delays; (6) the kind of information that IXCs should be required to provide to the BOCs for input into a data base system; (7) the manner in which 800 subscribers should be able to order new service or change existing service under the data base plan, and the means by which this information should be transmitted into the data base; (8) the role of Bellcore in administering the assignment of 800 numbers and certain aspects of the data base system; and (9) the manner in which 800 directory assistance should be offered.

II. BACKGROUND [4]

3. The term "800 service" refers to an interexchange service in which subscribers agree in advance to pay for calls made to certain numbers. Thus, the called party, rather than the calling party, pays for 800 calls without the need to involve an operator, as is the case with traditional "collect" calls. The service is used by businesses to provide potential customers and other persons a free and convenient means of contacting them. Since 800 service was first introduced by AT&T in 1967, it has proven to be one of the most popular and fast-growing telephone services. Indeed, over the last few years, AT&T's interstate 800 service conversation minutes have been growing at an annual rate of approximately 25 percent, and in 1986 its interstate 800 service revenues were approximately $3.5 Billion.[5]

4. Because of certain unique characteristics of 800 service, the procedures for routing 800 calls through the telephone network differ from those applicable to ordinary interstate calling. These differences give rise to a number of important policy issues concerning the manner in which local exchange access for 800 service is provided that implicate our long- standing goal of promoting free and open competition in the interstate services marketplace. We initiated this proceeding in order to address these issues.

5. One difference between the routing of 800 and ordinary interstate calls relates to carrier identification. When 800 service was first introduced, AT&T was the only IXC, and accordingly, all 800 calls were automatically routed by the LECs to it. Thus, as 800 service initially existed, there was no need for a LEC to screen any more than the first three digits (the dialed "800" prefix) of an 800 call to identify it as such. In a multiple IXC, equal access environment, however, a LEC must not only identify 800 calls, it must also determine the IXC to which such calls should be routed. In this context, 800 service presents unique access requirements. Because the called party pays for an 800 call and selects the IXC that will carry the call, the LEC in whose area an 800 call originates cannot identify the IXC to which the call should be routed in the same manner as it identifies the IXC for non-800 calls - that is, based on the caller's choice of IXC (presubscribed or otherwise). As a result of these access requirements, it was not technologically possible until recently for an IXC other than AT&T (other common carrier" or "OCC) to offer its own 800 service. Indeed, as noted above, AT&T remained the sole interstate 800 service provider until late 1986.

6. Another difference between 800 and other types of switched interstate services is that in order for an IXC to complete an 800 call, special number translation functions are necessary. Because 800 numbers are not POTS numbers[6] (the 800 prefix identifies the call as an 800 call, but does not contain routing information, as does an ordinary area code), 800 calls must be screened and translated before they can be routed over the telephone network.

7. From 1967 until 1981, AT&T performed this function by means of a methodology under which each digit of the 800 number contained routing and screening information necessary for the call to be processed. Consequently, un-

der this system, subscribers had no choice of 800 numbers and had to use different 800 numbers for interstate and intrastate calls. In addition, any change in their receiving location or in their subscribed service area required a change in their 800 number.

8. In 1981, AT&T began providing 800 service through its Common Channel Interoffice Signaling (CCIS) network and a data base containing 800 service information. Under this system, which AT&T still uses, 800 calls are routed to an AT&T Originating Screening Office (OSO). The OSO holds the call while signaling the data base through the CCIS network. The data base then screens the call to ensure that it is from a location included in the service area for that 800 service subscriber. If it is, it translates the 800 number into a ten-digit POTS number and returns the POTS number to the OSO so that the call may be routed over the regular network.[7]

9. The CCIS data base system can screen calls and translate the dialed 800 number into a POTS number based on a ten-digit reading. Consequently, AT&T can offer its subscribers a number of features that were unavailable under the previous system. For example, subscribers may choose their own 800 numbers, including verbally significant or other easily remembered numbers, and they may retain their 800 number even if they change their receiving location or service area. In addition, they may route 800 calls to different locations based on such factors as time of day, area of origination of the call, and call volume.

10. Under the Plan of Reorganization implementing the Modification of Final Judgment (MFJ),[8] AT&T retained the CCIS data base system.[9] At the same time, the BOCs were required to provide equal access to all IXCs for 800 service. In order to provide access for 800 service to multiple IXCs, the BOCs and many other LECs have implemented a six- digit screening methodology termed the "NXX" screening system. Under this system, LECs screen the first six digits of all originating calls. If the call is an 800 call, the LEC identifies it as such from the first three digits (the 800 prefix); the next three digits (the NXX digits) identify the IXC to which the call is to be routed. After screening the call, the LEC then routes the dialed 800 number to the IXC so that the call can be completed.

11. Because under the NXX screening methodology the IXC is identified by the NXX digits, the system requires that particular NXXs be reserved for particular IXCs. Consequently, 800 subscribers cannot change IXCs without changing their 800 number. In addition, subscribers are limited in their choice of 800 numbers to numbers beginning with NXXs reserved for their carrier.

12. The BOCs and some of the independent telephone companies (ITCs) are currently developing alternative 800 access systems, similar to AT&T's data base system, that will utilize common channel signaling technology (CCS-7) and data bases containing 800 service information. If implemented, these systems will generally work as follows: when an 800 call is made, the BOC (or ITC, if the ITC has a data base system) in whose exchange the call originates will route the call to a Service Switching Point (SSP). The SSP will hold the call while signaling the data base through the CCS-7 network. The data base will have the ability to: (1) determine which IXC is to carry the call based on a ten-digit reading of the number (ten-digit screening); (2) determine whether the call was from a subscribed service area (call validation); (3) translate the 800 number into a POTS number (POTS translation); (4) route the call to different IXCs in accordance with customer instructions based on time of day and other factors (multiple carrier routing); and (5) provide statistical information to subscribers on the nature of their 800 traffic. Because the data base systems would be able to perform ten-digit screening of 800 numbers, these systems would allow 800 number portability - that is, they would enable 800 subscribers to select verbally significant or other easily remembered 800 numbers, without NXX limitations based on IXC identification, and to change IXCs without changing their 800 number. These systems could also enable customers to economize their 800 service by selecting different carriers for different types of calls.[10]

13. Furthermore, the data base systems could enable small IXCs, which cannot perform POTS translation themselves, to compete with the larger carriers by offering a basic 800 service wherein the LEC performs the POTS translation and other data base functions (*e. g.* call validation) for them. These systems also would enable customers to use more than one IXC with the same 800 number. Thus, small IXCs could offer 800 service solely within a region in which they are active, even to customers who wish to have broader geographic coverage, without requiring such customers to use a separate 800 number for that region.

III. THE NOTICE AND THE CURRENT RECORD IN THIS PROCEEDING

14. In light of these benefits of the data base plan, we tentatively concluded in the *Notice* that "the BOC data base plan appears to have substantial benefits for 800 service subscribers"[11] and that the BOCs should be required to implement it.[12] Nevertheless, we stated that there were certain specific issues that needed to be addressed before we adopted an order. One such issue identified in the *Notice* was "the amount of the costs of implementing any mandatory or voluntary 800 access and how they should be recovered from 800 access and any other services to be provided via the data base plan."[13] Another issue we specifically raised was "if certain capabilities are held to be optional, how their pricing should be unbundled."[14] We also sought comment on whether we should establish detailed Commission rules on LECs' long-term 800 access obligations, or whether, in light of the efforts by the BOCs and other LECs to implement data base systems of 800 access, such rules would be unnecessary or possibly counter-productive.

15. Twenty parties filed comments in response to the *Notice*, and 16 parties filed reply comments.[15] All parties supported implementation of the data base plan of 800 access so as to allow ten-digit screening of 800 calls. Parties differed, however, on whether we should require the BOCs to implement a data base system or rely on market forces, which, it was assumed, would result in the voluntary implementation of the data base plan of 800 access without regulatory intervention. Parties also differed on whether the BOCs should be permitted to offer the optional features possible with the data base system. The parties agreed that a separate 800 access rate element should be established so that costs associated with the implementation and provision of 800 access are borne only by those IXCs offering 800 service. The parties also agreed that rates associated with the various optional services that might be offered through a data base system

should be unbundled so that only the users of such services are required to pay for them. The parties provided very little information, however, on the relative benefits of a data base system or the magnitude of the costs of implementing the data base systems.[16] Nor did they provide information that would allow us to formulate specific cost allocation rules or rate structures. Most of the parties stated that the costs of developing the data base systems, as well as the services for which they would be used (aside from 800 access service), were not yet known, so that rules concerning cost allocation and rate structure were premature at that time.

16. MCI strongly supported implementation of the data base plan in its comments and urged us to require all LECs to offer ten-digit screening of 800 numbers and to establish an implementation timetable with no waivers.[17] On March 16, 1987, however, MCI filed a letter with this Commission, addressed to the Chief, Common Carrier Bureau, in which it asserted that after completion of the pleading cycle in this docket, "more detailed information on the BOCs' 800 Service Database Plan has become available revealing serious unlawful and anticompetitive consequences that would result from its implementation."[18] MCI claimed that further comment on a number of issues was necessary. One such issue concerned the overall costs of the data base systems, mentioned above.[19] MCI claimed in its letter that the costs of these systems were "exorbitant" and not justified by the demand for them. MCI also expressed concern that (1) costs associated with any optional features that might be offered would be shifted into the revenue requirement for basic ten-digit screening; (2) in operating the data base system, the BOCs would have access to IXC proprietary information; and (3) Bellcore, which is owned by the BOCs, would be administering the reservation and assignment of 800 numbers.[20]

17. Several parties, including three IXCs that had previously participated in this proceeding - ALC, AT&T, and US Sprint - as well as four entities that had not - Clark Telecommunications, Inc., COMPTEL, ICORE, and Teltec Savings Communications Co.[21] - supported MCI's request that the record be reopened.[22] While, in general, those supporting MCI's request did so on one or more of the grounds stated by MCI, two other grounds were also raised. ALC expressed concern as to whether the BOCs would be the only point of contact for customers seeking modifications of their 800 access service, stating that such "intervention" between an end user and the IXC would confer a competitive advantage on the BOCs vis-a-vis the IXCs.[23] In addition, AT&T alleged that planned data base system architecture may produce an increase of as much as eight seconds in the post-dialing delay currently associated with 800 calls.[24] In *ex parte* meetings with the Common Carrier Bureau, AT&T expanded on these concerns and proposed that this Commission reserve one or two NXXs for each IXC, so that IXCs could offer certain 800 subscribers the faster call set-up time allowed by NXX access. AT&T stated that the increase in call set-up time associated with the data base system would be especially troublesome for customers who use 800 service for credit card validation service. AT&T also argued that this limited NXX option would not compromise the number portability benefits of the data base system or otherwise degrade, or add significant costs to, data base access service.[25]

18. All of the BOCs, GTE, and the United States Telephone Association (USTA) opposed MCI's request that the record be reopened.[26] The BOCs and GTE responded to MCI's contentions about the cost of the data base system by submitting cost data, consisting of estimated annual revenue requirements, for their data base systems. Projected annual revenue requirements (interstate and intrastate combined) ranged from $12M to about $50M and totalled $215M for the eight companies. Some of the BOCs also included in their letters estimated separations factors for these costs, which ranged from 20% to 60% for the interstate allocation.[27] In addition, some of the BOCs disputed AT&T's allegations concerning post-dialing delay under the data base system.[28] These BOCs asserted that the increase in call set-up time would be smaller than AT&T claims, would be substantially reduced by 1990, and would be eliminated altogether sometime thereafter. They also argued that a continued NXX option would be inefficient, since it would require double screening of all non-NXX 800 calls.[29]

IV. DISCUSSION

19. After review of the formal and informal record in this proceeding, we conclude that additional information on certain matters is necessary to enable us to reach an informed determination as to what regulations, if any, we should adopt for the provision of local exchange access for 800 service.

A. *Costs*

20. First, we seek additional information and comment relating to the costs of the data base systems.[30] Although the BOCs and GTE informally filed estimated revenue requirements for their data base systems, these estimates were generally accompanied by little or no supporting information or explanation of the assumptions or methodologies underlying them. Without a break-down of these data into their component elements and an explanation of how they were generated (*e. g.*, what assumptions were made concerning depreciation and amortization schedules), it is not possible for us and for interested parties to assess their accuracy. Therefore, these data, as presented, are not sufficiently responsive to our cost concerns.

21. Moreover, the total cost of the data base systems provides an incomplete measure of the impact these systems will have on 800 interstate access costs. The data base systems, including the associated signaling systems, appear to provide LECs with very versatile capabilities that will be used for a number of services in addition to the provision of access for interstate 800 service. Most obviously, they will be used for intrastate 800 service, and for the BOCs' own intraLATA 800 service. In addition, at least some of the BOCs will apparently use their data base systems for such other services as Custom Local Area Signaling Service (the so-called "CLASS" services); GATEWAY; and LATA-wide Centrex service, which are largely intrastate services.[31] Moreover, as noted above, the data base systems might be used to provide a number of optional 800 access services, in addition to basic ten-digit screening, such as POTS translation, call validation, and multiple carrier routing. The extent to which the costs of the data base systems will be allocated to other services such as these is directly relevant to the impact of these systems on 800 access costs.

22. The parties unanimously agree that if the data base system is used for the provision of access for interstate 800 service, a separate rate element should be established to recover the costs of providing this service. We tentatively

conclude, consistent with this view, that our Part 69 rules should be amended to establish an access element or category for 800 access service. We also tentatively conclude that pricing for any optional 800 features that are offered should be unbundled through the establishment of subelements as part of the separate 800 access element, and that in accordance with our longstanding policy, costs should be apportioned to these subelements on a fully distributed basis. Any other method would be inconsistent with current separations and access schemes.

23. In light of these tentative conclusions, we must have specific information on the various services for which the data base systems will be used initially, and current plans for and information about future uses. We also need information about the costs associated with the various optional 800 access features that may be offered with these systems. Currently, however, there is little information in the record as to exactly what other services will utilize the data base systems during its initial operational years, and what portion of the costs of these systems are properly allocable to these other services. Nor is there detailed information on current BOC and GTE plans for future uses of the data base systems, including the time frame, likelihood, and scope of such future uses. We also lack information that would allow us to determine what portion of the costs of the data base systems should be apportioned to the various optional 800 access services that might be offered with these systems. In light of the importance of this and other information to a proper assessment of the impact of the data base plan on 800 access costs, we request additional information and comment on the following matters: (1) the estimated total costs of implementing the data base plan and projected annual revenue requirements, with detailed explanation of the assumptions upon which these estimates are based; (2) the services, in addition to 800 access services, that will be provided with the data base systems during their initial years of operation, as well as future services that will or might be offered with these systems; (3) the relative size of the interstate and intrastate 800 markets in terms of minutes, messages, and revenues; (4) the extent to which data base system costs should be allocated to basic ten-digit screening capabilities, on the one hand, and the various optional 800 access services, on the other; (5) the manner in which interstate and intrastate costs will be separated under the Part 36 Separations Manual;[32] (6) an estimate of the jurisdictional allocation of data base system costs, with detailed explanation of the assumptions upon which such estimate is derived;[33] and (7) the appropriate accounting procedures, including amortization schedules, that should govern the recovery of data base system costs.[34] Participants in the data base plan should describe the nature of the facilities and expenses and estimated amounts attributable to each account, separations category, and access category in sufficient detail to enable us to devise appropriate access apportionment rules. All parties may, of course, suggest such rules. We also seek updated information on projected interstate 800 service minutes and revenues for the period 1988 through 1993.[35]

B. ***Benefits***

24. We also invite further comment on the benefits of the data base plan. In the *Notice*, we tentatively concluded that "the BOC data base plan appears to have substantial benefits for 800 subscribers."[36] In particular, the number portability made possible by the data base plan would appear to offer substantial benefits to 800 subscribers: (1) allowing OCCs to compete on equal terms for AT&T's substantial embedded base of 800 subscribers; (2) allowing all IXCs to offer the same 800 number possibilities to future 800 subscribers, including use of commercially attractive NXXs that are currently assigned to AT&T;[37] (3) promoting efficiency in the 800 interstate market by enabling customers to respond to price and service changes without changing their 800 number; and (4) promoting participation of small, regional IXCs in the interstate 800 market by enabling them to offer regional service to subscribers under the same 800 number that the subscribers use for calls originating from different areas.[38]

25. Furthermore, a subscriber's commitment to a given number is significant from a competitive perspective to the extent that the customers perceiving themselves to be "locked in" to their current 800 number represent so large a share of the market that the competitive market for 800 services is too small to warrant competitive entry. We note, however, that the 800 service market is rapidly growing. This rapid growth may, even without the introduction of the data base system, create the critical mass required for new 800 service providers to seek entry. The benefits of lower prices and innovative services likely to arise as a result of the competition for this segment of the 800 service market might still reach any captive customers.

26. Even if it did not increase competition within the 800 service market, the ability to provide 800 service by using a data base system might increase competition for other interstate telecommunications services. It might permit some IXCs that otherwise could not do so to offer a full line of services. The 800 service market is one in which the IXCs competing with AT&T have not yet achieved the same market share that they have garnered in other segments of the interstate services market. We note that most interestate service subscribers are not direct purchasers of 800 service. Those subscribing to this service are generally the larger, more sophisticated customers who can and do deal with multiple carriers. We seek comment on whether the economies of scope lost by some IXCs' inability to offer 800 service warrant our finding that introduction of the data base system is in the public interest.

27. Another capability of the proposed data base systems - POTS translation - would also appear to promote participation of small IXCs in the 800 market. Under the NXX system, each IXC receives only the dialed 800 number from a LEC. In order to route the call, therefore, the IXC must be able to translate the dialed number into a POTS number. This POTS translation function apparently requires a data base system.[39] The BOC data base plan would enable small IXCs that cannot afford their own data base system to pay a LEC to perform the POTS translation for them.[40] Alternatively, such small IXCs might prefer to pool their needs and resources and develop such a data base jointly. We invite comment as to whether this is a realistic or feasible alternative.

28. None of the comments disputed our tentative conclusion that a data base system would produce significant benefits. Indeed, there was uniform agreement that ten-digit screening, at least, was necessary for a fair and competitive interexchange 800 market. At the same time, however, little hard evidence was offered to substantiate or quantify these benefits. For example, none of the parties offered empirical evidence on the actual value of

number portability to 800 subscribers. Presumably, subscribers that use commercially valuable 800 numbers or that extensively market their 800 numbers would be substantially impeded from changing IXCs if such a change required them to abandon their 800 number. But no information was offered as to the number of 800 subscribers that are included in these groups or the amount of 800 traffic they represent.[41] Nor was information provided as to the value of number portability to subscribers that do not use commercially valuable 800 numbers and do not market their 800 number.[42]

29. Finally, it also appears that MCI and others may now be questioning some or all of the apparent benefits of the data base plan. A system that both enhances the ability of customers to make choices among competing suppliers and reduces barriers to entry so that more suppliers may participate in the market would seem to be procompetitive. Nevertheless, we would be concerned if some of the competitive suppliers, such as MCI, view the situation differently.[43] In light of these considerations, we now invite further information and comment on the benefits of the data base plan, including the value of number portability to 800 subscribers and to a competitive 800 interexchange market, and the value of the various optional functions that the BOCs expect to provide with their data base systems.

C. *Mandatory versus Voluntary Implementation*

30. We also seek further comment as to whether, assuming that the data base plan is found to be in the public interest, we should require the LECs to implement it, or defer to market forces to accomplish its implementation. The data base system would unquestionably provide customers with greater flexibility since, as noted above, customers could take 800 service from multiple carriers while having only one 800 number. The benefits of portability, however, might still be theirs with an optional data base system. If the costs of this system are high, then an optional data base service may not be viable unless demand is very strong. If, on the other hand, cost estimates for the new access offering translate into reasonable prices for what would be an optional access service, an effective market incentive for implementing that service will exist.

31. Some of the parties argued in their initial comments that Commission intervention was necessary to ensure that the data base plan was implemented on a nationwide basis.[44] These parties argued that some of the smaller ITCs might not participate in the plan unless required to do so, and that the value of the data base system as a whole depends on its ubiquitous implementation. Conversely, some parties argued that negotiations between the BOCs and GTE and the smaller ITCs were ongoing and that these negotiations would ensure that all LECs would be able to participate in the data base plan without Commission involvement on either side.[45] Still other parties asked us to impose regulatory obligations on the BOCs and larger ITCs to ensure that these negotiations resulted in smaller ITCs being able to access their data base systems on reasonable terms and conditions.[46] We are interested in updated information on the status of these negotiations, and in particular, whether all LECs appear willing and reasonably able to offer 800 access through a data base system without regulatory intervention. Parties addressing the desirability of the data base system may also wish to discuss any alternative means of achieving similar benefits. Before we mandate expenditures by carriers to introduce such a system, recovered ultimately from ratepayers, we wish to examine carefully whether there are less costly means of achieving similar results.

D. *NXX Access as an Option*

32. A related issue about which we also seek comment is whether, assuming we either permit or require LECs to provide 800 access through a data base system, we should require LECs to continue offering an NXX option to IXCs and/or individual 800 subscribers. The availability of both of these systems simultaneously would, in theory, allow market forces to control the choice between them. However, the data base plan and the NXX screening system may be incompatible making an unbiased market test impossible. For example, if IXCs were permitted to choose between the two 800 access systems, AT&T might have an incentive to elect the NXX option as a means of preserving its existing customer base and its control over commercially valuable NXXs. If this occurred, the value of the data base plan to the OCCs might be reduced substantially, while charges for its use might increase substantially. Under these circumstances, they too might elect the NXX option. In short, a "market test" of the NXX and data base systems might not reflect unimpeded market choices, but rather incentives that have been biased due to AT&T's previous provision of 800 service.

33. In addition, it might be unnecessarily burdensome on customers to offer individual 800 subscribers a choice between the NXX and data base systems. The NXX system requires that specific NXXs be assigned to specific carriers. Thus, a dual access system would require dedication of certain NXXs for the NXX system and others for the data base system. Typically, however, many 800 subscribers share a single NXX. If some of those subscribers elected the data base system while others elected the NXX system, the only way to accommodate these choices would be to require the members of one group or the other to change their 800 numbers.

34. There may also be technological problems with a dual system of 800 access. For example, in order to provide such access, all 800 calls would have to undergo a preliminary screening process to separate the "NXX" numbers from the "data base" numbers. This preliminary screening could conceivably be accomplished by treating all 800 calls initially as either NXX or data base calls and routing them through one system or the other for separation. Such an approach, however, might affect the operation of one or both of these systems.[47]

35. We are interested in receiving comments from interested parties on the feasibility of a dual system of 800 access. In particular, we seek comments on whether it would be desirable or possible to offer a choice of NXX and data base system screening simultaneously to IXCs or 800 subscribers, with specific reference to the issues we raised above, and the manner in which such a dual system could be offered.

E. Post - Dialing Delay

36. We also request further information and comment on the "post-dialing delay" issue since our analysis of this issue is an important element of our public interest assessment of the data base system. AT&T maintains that the data base plan would significantly increase call set- up time for 800 calls, and that a limited continuation of NXX access would allow certain 800 service subscribers to avoid this increase without compromising the number portability benefits of the data base system or otherwise degrading data base access service.[48] AT&T proposes that one to three currently unassigned NXXs be reserved to each IXC for this purpose. Ameritech and Bell Atlantic dispute AT&T's factual assertions. They claim that the data base plan will not increase call set-up time by as much as AT&T claims, that this increase will be substantially reduced by 1990 and eliminated altogether thereafter, and that a limited NXX option would be inefficient, and indeed, would increase post-dialing delay for all non-NXX 800 calls.[49]

37. Because this matter was not raised in the *Notice* or comments, most of the parties have not had the opportunity to respond to AT&T's assertions or its proposal, and there is very little record upon which to weigh the conflicting *ex parte* allegations of AT&T and the responding BOCs. Accordingly, we seek further comment on the following matters relating to this issue: (a) call set-up times under the NXX system and under the data base systems as they will be initially implemented (a description of the various technical configurations that will be used in implementing the data base systems and their impact on call set-up time should be included; the time increments attributable to each discrete step in connecting an 800 caller to the appropriate IXC should be identified); (b) the prospects for reducing call set-up time under the data base systems, including the time frame for, and cost of, such reductions; (c) the degree to which 800 callers or particular service usages are sensitive to call set-up delays, and the alternatives available to them; (d) the extent, if any, to which AT&T's proposal to continue a limited NXX option would increase call set-up time for data base system calls; and (e) the extent to which there would be other costs or inefficiencies associated with maintaining NXX access as a limited option, as AT&T proposes.

F. Customer Contact / Proprietary Information / Role of Bellcore

38. Allegations that certain aspects of the BOC data base plan are anticompetitive also warrant comment because, as part of our public interest assessment of the data base system, we will consider its competitive impact. For example, some of the IXCs have expressed concern over the manner in which 800 subscribers would be able to order or change their 800 service under the BOC plan, as well as the manner in which service orders would be transmitted to the Service Management System or SMS (the centralized data base that will contain current and past 800 service information). These IXCs allege that current plans would allow the BOCs to be a subscriber's point of contact for ordering or effecting a change in interexchange 800 service. This, they assert, would relegate the IXCs to a mere "pipeline" function in the provision of interexchange 800 service and thereby destroy competition in the interexchange 800 market. They further allege that IXCs and ITCs will not be able to input service information directly into the SMS, but instead will have to provide such information (including proprietary information) to the BOCs for transmittal. Neither of these issues was addressed in the formal record, and we now seek comment on them.[50]

39. Some IXCs have also asserted that BOC information requests for the SMS are overbroad in some cases and extend to sensitive proprietary information for which the BOCs have no legitimate need.[51] This problem is exacerbated, according to MCI, since a BOC affiliate - Bellcore -is administrator of the SMS and assignor of all 800 numbers. The BOCs have stated that the information they are requesting is necessary in order for them to identify their own intraLATA 800 calls when subscribers utilize the same 800 number for interLATA and intraLATA 800 service.[52] Although MCI briefly discussed the role of Bellcore in its initial comments, neither it nor any other party addressed these specific issues in detail. We find that since these issues have taken on some importance since the close of the formal record in this proceeding, we should seek further comment on them in this *Supplemental Notice*.

G. 800 Directory Assistance

40. Finally, we seek comment on the manner in which 800 directory assistance (DA) should be offered in a multi-carrier 800 environment. In its Order approving the Plan of Reorganization, the MFJ court held that 800 DA was an interexchange function for purposes of the decree and assigned the assets the Bell System used to provide that system to AT&T.[53] Since that time, AT&T has been the only source of 800 DA service. AT&T provides this service as part of its basic 800 service offering, without separate tariff charges to callers or subscribers.

41. In its comments in response to the *Notice*, GTE argues that in a multi-carrier environment, 800 DA should be available to all 800 subscribers from one centralized source. GTE takes no position on whether AT&T or some other entity should be that source. BellSouth supports GTE's proposal and suggests that this Commission treat 800 DA as an "essential facility" to which all 800 service subscribers may have access. The only other parties to comment on GTE's proposal neither support nor oppose it. AT&T states that the proposal is beyond the proper scope of this proceeding; MCI states that we should explore alternatives to the current 800 DA system; and Southwestern Bell asks that LECs not be required to provide 800 DA.

42. We find that 800 DA is an issue that requires further consideration. While AT&T's monopoly on 800 DA service may have been appropriate when AT&T was the sole IXC providing 800 service, we are concerned that in a multi-carrier environment, current arrangements for the provision of this service might not be consistent with the public interest. In particular, while AT&T might offer "listing" opportunities to OCCs' susbscribers, if it did not do so, these carriers would either have to market 800 service without a DA offering, or provide their own 800 DA service. If OCCs did not offer their own DA service, they would be at a serious disadvantage in competing for many 800 service subscribers. On the other hand, if OCCs provided their own DA service, callers would be forced to try multiple DA services in order to obtain the 800 number they were seeking, which would be both confusing and inconvenient. In addition, it might well be unreasonable for one IXC to utilize the current 800 DA service number, (800) 555-1212, for its 800 DA when others could not do

so. Thus, it might be necessary to introduce new 800 DA numbers altogether, thereby heightening public confusion. Furthermore, IXC-specific DA service might well provide AT&T with an undue competitive edge in the 800 market, since subscribers might anticipate that callers would try the largest carrier first. While these problems might be alleviated if AT&T offered "listing opportunities" to OCCs for their 800 subscribers, this option raises questions as to the potential for discriminatory treatment of OCCs' subscribers.

43. A possible alternative to the current system would be for us to require the BOCs to offer 800 DA service, presumably on a tariffed basis, to all IXCs. However, this might not be desirable from the standpoint of IXCs, such as AT&T, that have developed their own 800 DA capabilities.[54] Another alternative would be for us to require the BOCs to provide listing information necessary to operate an 800 DA service to those IXCs, or perhaps independent firms, that wished to offer a comprehensive DA service.[55] This approach would seem to address some of our concerns about customer confusion and competition, although difficulties (*e. g.* the assignment of the 800-555-1212 number) would appear to remain.

44. Because of the scant record on 800 DA issues, we do not have sufficient information upon which to determine whether rules addressing the situation are necessary, and if so, what those rules should be. Additional information and comment on these matters would allow us to better assess them.

V. MISCELLANEOUS ISSUES

45. All interested persons may file comments on the issues and proposals discussed herein not later than **April 4, 1988,** and reply comments may be filed not later than **May 3, 1988.** In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, an original and five copies of all statements, briefs, comments, or replies shall be filed with the Federal Communications Commission, Washington, D.C. 20554, and all such filings will be available for public inspection in the Docket Reference Room at the Commission's Washington, D.C. office.

46. The *ex parte* rules described in paragraph 34 of the *Notice* continue to apply in this proceeding.

47. The Regulatory Flexibility Act[56] is not applicable to the rule changes proposed in this proceeding. In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of this *Supplemental Notice* in the Federal Register. As part of our analysis of the proposed rules described in this Order, however, this Commission has and will continue to consider the impact of this Rule Making on small telephone companies, *i. e.*, those serving 50,000 or fewer access lines.[57] The data base proposal contained herein should not adversely impact such small telephone companies since, if adopted, small telephone companies would be able to participate in the data base plan without substantial cost by routing 800 traffic to larger telephone companies.

VI. ORDERING CLAUSES

48. Accordingly, pursuant to the provisions of sections 1, 4(i), 4(j), 201-205, 218, 220, 303(g), 303(r), 403 and 404 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 218, 220, 303(g), 303(r), 403 and 404, and Section 553 of the Administrative Procedure Act, 5 U.S.C. § 553, NOTICE IS HEREBY GIVEN of the proposed adoption of new or modified rules, in accordance with the discussion and delineation of issues in the Supplemental Notice of Proposed Rule Making and on the basis of previous notices and filings in this proceeding.

49. The petition for reconsideration filed by GTE Sprint (now US Sprint) on March 3, 1986, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX A

List of Parties That Filed Comments or Reply Comments

ADAPSO

ALC Communications Corp. (ALC)

Ameritech Operating Companies (Ameritech)

Anchorage Telephone Utility (Anchorage Telephone)

Bell Atlantic Telephone Companies (Bell Atlantic)

BellSouth Corp. (BellSouth)

GTE Corp. (GTE)

Mountain Bell, Northwestern Bell and Pacific Northwest Bell Telephone Companies (U.S. West)

National Telephone Cooperative Association (NTCA)

New York Department of Public Service

NYNEX Telephone Companies (NYNEX)

The Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)

Pacific Bell

Public Utilities Commission of the State of Calif. (Calif. PUC" or "CPUC)

Southern New England Telephone Company (SNET)

Southwestern Bell Telephone Company (Southwestern Bell)

TEC Communications Services, Inc. (TEC)

United States Telephone Association (USTA)

US Telecom, Inc. (US Telecom)

United Telephone System (UTS)

FOOTNOTES

[1] Provision of Access for 800 Service, Notice of Proposed Rule Making, CC Docket No. 86-10, 102 FCC 2d 1387 (1986).

[2] 47 U.S.C. § 151 *et seq.* (1982).

[3] We expressly limited the scope of the Rule Making proceeding to the long-term obligations of the LECs, holding that a Rule Making proceeding on LECs' interim 800 access obligations was

unnecessary. On March 3, 1986, GTE Sprint (now US Sprint) filed a petition for reconsideration of our decision to deny the petition for Rule Making with respect to interim 800 access obligations. In its petition, Sprint argues that we should initiate a Rule Making proceeding in which we would propose to adopt rules requiring the larger independent telephone companies to provide interim 800 access via the NXX screening methodology, which is described *infra*. Sprint's petition raises no new arguments or facts as to interim 800 access issues. Moreover, since the filing of Sprint's petition, the larger independent telephone companies have begun offering such access. Thus, we deny Sprint's petition for reconsideration.

[4] The *Notice* provided a detailed description of the development of 800 service and its technical and marketing characteristics. (*Notice* at paras. 2-5). In this *Supplemental Notice*, we provide a brief summary of this background, as well as updated information on developments since the adoption of the *Notice*.

[5] Letter from George D. Morlan, Director, AT&T, to Gary Phillips, Common Carrier Bureau, dated July 27, 1987. AT&T minutes and revenues represent virtually all interLATA 800 service minutes and revenues, since competitive interLATA 800 service was not introduced until the very end of the year (by MCI), and then, only on a limited market-testing basis. Currently, AT&T and MCI are the only 800 interLATA service providers. AT&T has estimated that its conversation minutes will grow at a somewhat slower rate in 1987 (approximately 15%), and its results in the early part of the year are consistent with that estimate. *Id.*

[6] "POTS" is a widely-used acronym for "Plain Old Telephone Service." A ten-digit POTS number is an ordinary telephone number under the North American numbering plan, consisting of a three-digit area code and a seven-digit local exchange number.

[7] If the call is an intraLATA 800 call to be completed over the BOC network, AT&T routes the call back to the BOC.

[8] United States v. AT&T, 552 F. Supp. 131 (D.D.C. 1982), *affd sub nom.*, Maryland v. United States, 460 U.S. 1001 (1983) (approving MFJ); United States v. AT&T, 569 F. Supp. 1057 (D.D.C.), *aff'd sub nom.*, California v. United States 464 U.S. 1013 (1983) (approving Plan of Reorganization). The MFJ settled an antitrust suit brought by the United States against AT&T and required AT&T to divest itself of the BOCs. The Plan of Reorganization specified the assignment of assets and other steps that would be necessary to implement the divestiture.

[9] The Plan provided that this system would belong to AT&T based on the conclusion that the system performed interexchange, and not exchange access, functions. The Plan further provided that AT&T must lease access to the system to the BOCs for their provision of intraLATA 800 service. The BOCs were not, however, permitted to use the system to provide access to the OCCs. In December, 1983, the Department of Justice (DOJ) filed a motion with the MFJ court asking that the Plan of Reorganization be amended to allow the BOCs to use AT&T's data base system to route 800 calls for the OCCs until the BOCs were able to implement their own data base systems. DOJ contended that this amendment was necessary to allow the BOCs to meet their equal access obligations under the MFJ and to allow the OCCs to compete on equal terms with AT&T in the lucrative 800 market. In United States v. AT&T, 604 F. Supp. 316 (D.D.C. 1985), the court denied DOJ's motion. However, the court did order AT&T to provide the BOCs with the hardware, software, and technical information necessary for them to develop their own data base systems.

[10] The data base system could also enable the BOCs to perform the POTS translations required for the BOCS to offer their own intraLATA 800 service independent of the IXCs.

[11] *Notice* at para. 16

[12] *Id.* at para. 18.

[13] *Id.*, para. 18(e)

[14] *Id.*, para. 18(f)

[15] A list of parties that filed comments or reply comments is set forth in Appendix "A" to this *Supplemental Notice*.

[16] Only Bell Atlantic set forth a "bare bones" estimate of the costs of its data base system, but Bell Atlantic did not provide any explanation of the basis for its estimate and did not precisely describe the costs that were encompassed within it. *See* Bell Atlantic Comments at 6.

[17] MCI Comments at 12-13.

[18] Letter to Albert Halprin, Chief, Common Carrier Bureau from Gerald J. Kovach, Senior Vice President, Regulatory and Public Policy, MCI Communications Corp., March 16, 1987, p. 1. On the same day, MCI also filed a "Motion to Cease Deployment of Interexchange and Information Service Capabilities in BOC 800 Service Database" with the MFJ court. In its motion, MCI alleged that the BOCs were planning to provide information and interexchange services with their data base systems in violation of the MFJ, and asked that court to prohibit further development of such service capabilities pending further order of the court. MCI also asked the court to order DOJ to report on whether the 800 service functions being developed by the BOCs and Bellcore violated the MFJ, and if so, what sanctions were appropriate. On May 19, 1987, the court issued an order directing DOJ to respond to allegations that DOJ had neglected to investigate or take appropriate enforcement action to remedy various alleged violations of the decree, including "the alleged development by Bellcore, BellSouth, and Southwestern Bell of an 800 service database that competes with interexchange services." United States v. Western Electric Co., Civ. No. 82-0192, slip op. (D.D.C. May 19, 1987) at 1-2. DOJ filed a report on this issue on July 15, 1987 concluding that MCI's allegations about BOC use of the data base system for interexchange and information service functions were without merit, and, in particular, that POTS translation and multiple carrier routing - two of the services that were the focus of MCI's petition - are not interexchange services, which the BOCs are prohibited from offering under the MFJ. DOJ also concluded that the MFJ requires that these services be offered by the BOCs on an unbundled, nondiscriminatory basis. Further Response of the United States to MCI's Motion to Cease Deployment of Interexchange and Information Service Capabilities in BOC 800 Service Database, Civil Action No. 82-0192 (Further Response of DOJ). The court has not, as of yet, ruled on MCI's petition.

[19] On April 9, 1987, MCI filed a "Petition for Immediate Investigation" which asks this Commission to initiate an investigation to determine whether any of the BOC expenditures for their 800 data base systems or BOC investments in fiber optic transmission facilities should be disallowed. While we are not persuaded that a formal investigation of BOC data base expenditures is necessary, we are seeking in this *Supplemental Notice* the type of detailed data on the costs of the data base systems that MCI suggests we should gather and examine. MCI, which has been an active participant in this proceeding, will have the opportunity to comment on the responses of the BOCs and other LECs to this *Supplemental Notice*. To the extent that the petition seeks an investigation of BOC expenditures on fiber optic transmission facilities, we do not find that MCI has demonstrated that a formal investigation is necessary.

[20] This last issue was also raised in MCI's initial comments. In its letter, MCI raised other "issues" as well. For example, MCI claimed that the BOCs have failed to comply with our Computer III rules requiring Comparably Efficient Interconnection (CEI) and Open Network Architecture (ONA) plans, and that the BOC

systems gave the BOCs a competitive advantage with respect to the provision of optional features, since the BOCs could perform these functions for their own customers with one data base query, while IXC calls would have to be screened twice - once by the BOC for basic routing, and once by the IXC to perform other functions, such as POTS translation, etc.

[21] Clark and Teltec are regional IXCs; COMPTEL (the Competitive Telecommunications Association) is an industry association of competitive IXCs; ICORE is a consulting firm that represents small ITCs.

[22] This support was expressed in a series of *ex parte* letters filed with the Commission, dated between March 30, 1987 and May 1, 1987.

[23] Letter to Albert Halprin, Chief Common Carrier Bureau, from Mitchell F. Brecher, Asst. General Counsel and Director, Regulatory Affairs, ALC Communications Corp., April 24, 1987.

[24] Letter to Albert Halprin, Chief, Common Carrier Bureau, from D.J. Culkin, Corporate Vice President, AT&T, April 7, 1987, pp. 2-3.

[25] Letters to William J. Tricarico, Secretary, Federal Communications Commission, from George D. Morlan, Director, AT&T, dated March 26, 1987 and May 1, 1987.

[26] This opposition was expressed in a series of *ex parte* letters filed with the Commission, dated between March 26, 1987 and May 19, 1987.

[27] Letter to William J. Tricarico, Secretary, Federal Communications Commission, from Ernest L. Bush, Director - Federal Regulatory, BellSouth Corp., dated May 1, 1987 (projecting 20% interstate allocation); letter to Gerald Brock, Chief, Common Carrier Bureau, from James J. Farrell, Executive Director - Federal Relations, Bell Atlantic, dated May 19, 1987 (projecting 26% interstate allocation); letter to William J. Tricarico, Secretary, Federal Communications Commission, from Martin E. Grambow, Executive Director - Federal Relations, Southwestern Bell Corp., dated May 4, 1987 (projecting 30% interstate allocation); letter to Albert Halprin, Chief, Common Carrier Bureau, from Ronald H. Sirch, Executive Director, Federal Regulatory Matters, NYNEX, dated May 1, 1987 (projecting 60% interstate allocation); and letter to Albert Halprin, Chief, Common Carrier Bureau, from Ronald Stowe, Vice President, Washington Operations, Pacific Telesis, dated May 1, 1987 (projecting 60% interstate allocation).

[28] Letters to William J. Tricarico, Secretary, Federal Communications Commission, from James K. Smith, Director-Federal Relations, Ameritech, dated April 27, 1987, and from Marcia V. Breinich, Director-Federal Relations, Bell Atlantic, dated May 20, 1987.

[29] The BOCs maintain that, to implement the AT&T option, all 800 calls would first have to undergo NXX screening to separate the NXX calls from those that would be sent to the data base for ten-digit screening. The non- NXX calls would then undergo data base screening.

[30] By "costs of the data base systems," we mean the total costs of implementing and operating them. These costs would include, for example, Bellcore's costs for updating the data base and assigning numbers to 800 customers, the costs of mediating any customer disputes over number assignment, reconfiguration costs associated with changing from an interim NXX system to a data base system and any other on-going BOC costs.

[31] *See* Bell Atlantic Comments at 6; and GTE Comments at 14. The data base systems may also be used for such other services as 900 service; 700 service; certain operator services; ISDN; and private virtual network service. *Id.* ; letter from Ernest Bush, Director - Federal Regulatory, BellSouth Corp., to William J. Tricarico, Secretary, Federal Communications Commission, dated May 1, 1987; letter from James G. Pachulski, Attorney, Bell Atlantic, to Albert Halprin, Chief, Common Carrier Bureau, dated May 1, 1987; and letter from Eldridge A. Stafford, Director - Regulatory Affairs, US West, to Albert Halprin, Chief Common Carrier Bureau, dated May 4, 1987.

[32] Although we have recently held that costs attributable to the provision of interim 800 access under the NXX system must be separated in accordance with the "equal access costs" category, we expressly stated in that decision that our conclusion did not necessarily extend to data base system costs. *See* In the Matter of Interim 800 Exchange Access Tariffs, Memorandum Opinion and Order, CC Docket No. 86-279, 2 FCC Rcd 5905, 5908- 09 (1987). Indeed, we recognized that the "equal access costs" category somewhat overstates the interstate allocation by excluding intraLATA traffic, even though interim 800 arrangements will be used for intraLATA 800 service. We found, however, that inasmuch as interim 800 access costs are relatively small and the arrangement might well be replaced by 1989, this overstatement did not warrant the creation of a special 800 access allocator that more accurately allocated costs. We reiterate today that the separations treatment for interim 800 access is not necessarily appropriate for the data base system or, for that matter, any more "permanent" system of 800 access. Commenters are encouraged to describe the apportionment of data base costs under the Part 36 Manual and to comment upon the equities of the results. Although any change in those rules would require a separate Joint Board proceeding, we will consider such comments in determining whether a separations proceeding should be initiated.

[33] These estimates should take into account the different services for which the data base system will be used and the probability that, for 800 service, the relative jurisdictional use of the optional, vertical features will differ from that of ten-digit screening (since the BOCs presumably will use the optional offerings for their intraLATA 800 service, while many IXCs may instead rely on their own systems for such features).

[34] The Common Carrier Bureau has recently advised carriers of the appropriate accounting treatment for data base system costs incurred prior to implementation of these systems. *See* In the Matter of Annual Access Tariff Filings, Memorandum Opinion and Order (released Dec. 24, 1987) at paras. 72-79. Specifically, the Bureau advised carriers that these costs should be accumulated in Account 100.2 "Telephone plant under construction" as long-term projects. After January 1, 1988, carriers should use Account 2004 "Telecommunications plant under construction - long term." Expenses that would not be capitalized should be accumulated prior to January 1, 1988 in Account 139 "Other deferred charges," and thereafter, in Account 1439 "Deferred charges." We agree that this is the correct application of our accounting rules.

[35] Based on the data now in the record, it appears that the annual interstate revenue requirement for 800 access service under the data base system would approximate 1-2% of 800 interstate revenues in 1989: Interstate 800 service revenues exceeded $3.5B in 1986. From 1984 to 1986, interstate 800 service conversation minutes increased by 50%. *See supra* at para. 3. Assuming a 15% growth rate between 1986 and 1989, interstate 800 revenues will approximate $5.3B in 1989, the year in which it appears the data base system could be implemented on a nationwide basis. If 30% of the estimated total 1989 data base system annual revenue requirement of $215M is allocated to the interstate jurisdiction, this revenue requirement would represent 1.2% of interstate 800 revenues for that year. A 50% allocation would represent 2.0% of projected interstate 800 revenues for 1989. If the market for 800 service continues to grow in the post-1989 period at or near its present rate, these percentages should be substantially smaller in later years. We invite parties to comment on this approach to assessing the relative costs of the data base systems of 800 access.

[36] *Notice* at para. 16

[37] Because of AT&T's historical monopoly on interstate 800 service, AT&T customers are already using many NXX combinations, including many of the commercially attractive ones (*e. g.*, the NXXs that spell out the words "USA," "THE," and "CAL[L|.) Without number portability, these NXXs would be permanently foreclosed to OCCs. Allowing 800 subscribers to take their 800 number with them when switching IXCs does not appear feasible because numerous subscribers typically share an NXX (potentially as many as 10,000), so all of those subscribers would have to agree to switch to the new IXC (or change their number) in order for any of them to be able to do so. *See infra*, para. 31. Nor would a Commission-required NXX reassignment appear to be a feasible alternative means of addressing this problem since this would require that existing customers either accept a new "assigned" IXC that they would not otherwise choose, or change their 800 number. We are not inclined to impose such a choice on existing 800 subscribers.

[38] *See* Letter from Mark T. Neptune, Vice President - Operations, TELTEC, to Albert Halprin, Chief, Common Carrier Bureau, dated April 2, 1987, (TELTEC letter) (generally supporting BOC data base plan because as "a regional carrier with limited resources," TELTEC "is not in the position to develop its own database system nor purchase the hardware needed to implement it).

[39] *See* USTA Reply Comments at 8.

[40] Under the NXX plan, small IXCs could route 800 calls for POTS translation to another IXC that has its own data base system. However, such an arrangement might be less desirable to small IXCs than receiving POTS translation from a noncompetitor in the interexchange market. *See* TELTEC letter. (We are sure that any system developed by the major IXCs will leave very little for the smaller IXCs as to market share whereas the BOC system as described gives the smaller carrier a chance at niche markets.)

[41] We recognize that this information may not be readily available to the participants in this proceeding, but to the extent that it does exist or could be obtained, parties should make it available in their comments, as it would be useful in gauging the actual benefits of the data base system.

[42] Even those subscribers that do not have verbally significant or easy- to-remember 800 numbers and that have not marketed their 800 numbers may be reticent to change their 800 number, since any change in a commercial telephone number represents an inconvenience to the business involved and its customers.

[43] We recognize, of course, that the strategic competitive interests of the second largest firm (*i. e.*, MCI) in a highly concentrated market (*i. e.*, the interstate 800 services market) may not always coincide with the public interest. Nevertheless, we are very interested in the views of MCI and other IXCs on the benefits of the data base plan as compared to other forms of 800 access, as well as the views of 800 subscribers on these issues.

[44] *See* Comments of ALC; BellSouth; GTE; MCI; the New York Department of Public Service; Southwestern Bell; US Telecom; and UTS.

[45] *See* Comments of Ameritech; Anchorage Telephone; AT&T; NTCA; NYNEX; OPASTCO; Pacific Bell; TEC; USTA; and US West.

[46] For example, SNET urged us to establish guidelines to govern interconnection arrangements between small ITCs and large ITCs or BOCs and to provide recourse for noncompliance through a complaint process. TEC and OPASTCO stated that we should establish an industry forum to foster cooperation between small ITCs and the larger LECs, and that we should seek quarterly reports on the status of interconnection arrangements and steps taken to provide small ITCs with software, hardware, and technical assistance. UTS also supported the establishment of an industry forum to foster cooperation between small ITCs and other LECs.

[47] We address some of these issues in the context of a specific AT&T proposal for a limited version of a dual system of 800 access. *See infra* paras. 37-38.

[48] *See* Letter from George Morlan, Director, AT&T, to William J. Tricarico, Secretary, Federal Communications Commission, March 26, 1987; and Letter from D.J. Culkin, Corporate Vice President, AT&T, to Albert Halprin, Chief, Common Carrier Bureau, dated April, 7, 1987.

[49] *See* Letters from James K. Smith, Director - Federal Relations, Ameritech, and Marcia V. Breinich, Director - Federal Relations, Bell Atlantic, to William J. Tricarico, Secretary, Federal CommunicationsCommission, dated April, 27, 1987 and May 20, 1987, respectively.

[50] MCI also alleges that the BOCs have failed to comply with our Computer III rules requiring Comparably Efficient Interconnection (CEI) and Open Network Architecture (ONA) in the design of their data base systems. This argument is misplaced here. This proceeding is concerned with BOC use of the data base system for 800 access service, which is a basic service to which the CEI and ONA requirements do not apply. To the extent the BOCs use their data base systems in offering enhanced services or in designing their ONA plans, we will consider whether those systems satisfy our *Computer III* requirements at that time. MCI also raises other objections to the BOC data base plan that appear to assume that the BOCs will be offering interstate 800 service in competition with IXCs. The BOCs are presently prohibited by the MFJ from participating in many interstate services. *See* United States v. Western Electric Co., Inc., Civ. Action 82-0192 (Sept. 10, 1987). We will, however, consider any safeguards that may be suggested to ensure the BOCs do not use their control of the data base system in an anticompetitive fashion. In addition, if the remaining MFJ restrictions are modified or removed, we will consider any additional safeguards that may be necessary in light of the changed circumstances.

[51] MCI and US Sprint recently challenged revisions proposed by Southwestern Bell to the information reporting requirements for its NXX 800 Access Service. The Bureau found that those petitioners had not presented sufficiently compelling arguments to warrant suspension or investigation of the proposed tariff revisions. In the Matter of Southwestern Bell Telephone Company, Order, Transmittal Nos. 1537 and 1560, released May 15, 1987. An Emergency Petition for Reconsideration and Petition for Expedited Investigation was filed by MCI and is now pending.

[52] Even with the data base system, the BOCs may need some information from the IXCs in order to identify intraLATA calls. We understand that this issue is currently the subject of negotiation between the BOCs and IXCs that are planning to offer 800 service. We are interested in comment on the status of these negotiations and on what, if any, Commission action would be appropriate.

[53] In reply comments filed in connection with its March 16, 1987 Motion to Cease Deployment of Interexchange and Information Service Capabilities in BOC 800 Service Database (filed with the MFJ court), MCI argued that national directory assistance listings described in BOC promotional materials would constitute interexchange and information services, prohibited under the MFJ. DOJ responded that while BOCs may not operate an interexchange service that would provide callers with 800 DA information, the decree does not prohibit them from making their customers' numbers available to distant callers that use an IXC's

service to access the DA service. DOJ also stated that, in its view, the BOCs' provision of printed directories is not an information service. *See* Further Response of DOJ at 18-20.

[54] BOC provision of 800 DA might also raise questions under the MFJ. *See* DOJ Further Response at 18.

[55] Indeed, the BOCs may be contemplating providing 800 DA listings in this fashion. *See* DOJ Further Response at 18-19.

[56] 5 U.S. C.§ 601, *et seq.* (1987).

[57] Because of the nature of local exchange and access service, this Commission has concluded that small telephone companies are dominat in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, this Commissio is not required by the terms of that Act to apply the formal procedures set forth therein. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible, consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 88-37

In the Matter of

Amendment of Parts 13 and 80 of the Rules concerning ship radio officer qualifying service endorsements.

NOTICE OF PROPOSED RULE MAKING

Adopted: January 27, 1988; Released: February 17, 1988

By the Commission:

1. This *Notice of Proposed Rule Making* (*NPRM*) proposes to amend those sections of Part 13 (Commercial Radio Operators) and Part 80 (Stations in the Maritime Services) of our Rules, 47 C.F.R. Parts 13 and 80, that relate to the requirements for the ship radio officer qualifying service endorsements. Additionally, the NPRM proposes to clarify and simplify the Commission's policy regarding the criteria for the issuance of the radio officer qualifying service endorsement.

2. *Background*. Part II of Title III (Radio Equipment and Radio Operators on Board Ship) of the Communications Act of 1934, as amended (Act), requires large oceangoing ships to carry certain types of radio equipment and personnel for safety purposes. Cargo ships of 300 to 1600 gross tons that do not have a radiotelegraph station on board must be equipped with a radiotelephone station. 47 U.S.C. § 351(a)(1)(B). Passenger ships irrespective of size and cargo ships of 1600 gross tons and over must be equipped with a radiotelegraph station and carry at least two radio officers. 47 U.S.C. §§ 351(a)(1)(A) and 353(a). However, Section 353(b) of the Act permits cargo ships that are equipped with a radiotelegraph auto alarm to carry a single radio officer who has at least six months previous service as a radio officer on board a ship or ships of the United States.[1]

3. Section 3(z)(1) of the Act, 47 U.S.C. § 153(z)(1), defines a radio officer as a person holding at least a first or second class radiotelegraph operator's license issued by the Commission. When such a person is employed to operate a radiotelegraph station on board a U.S. ship, a radio officer license issued by the U.S. Coast Guard is also required. In order to serve as the sole radio officer on board a cargo ship under the provisions of Section 353(b), a radio officer must have a six months service endorsement on the radiotelegraph license issued by the Commission. Under the Commission's current Rules and policies an applicant for a six months service endorsement must document satisfactory service:

(a) as a radio officer;

(b) on board a ship or ships of the United States;

(c) with a radiotelegraph station that complied with Part II of Title III of the Act;

(d) for a combined period of at least six months (180 days, hours per day totalling at least 1440 hours);

(e) while holding both a valid FCC first or second class radiotelegraph operator's certificate, and

(f) a radio officer license issued by the Coast Guard (Coast Guard U.S. Merchant Marine Officer License).

All six of these prerequisites must occur simultaneously. As a matter of policy, waivers have not been issued for any of the listed prerequisites.[2] In the absence of the above documentation, however, the Rules allow the applicant to self-certify that the prerequisites have been met. 47 C.F.R. § 13.12(b)(3)(i) - (vii).

4. In the past several months, we have received a number of inquiries and complaints concerning the difficulties encountered by radio officers attempting to obtain the six months service endorsement. [3] Generally, two problem areas are raised. The first relates to the requirement that an applicant for the six months service endorsement possess a Coast Guard radio officer license during the entire six month qualifying period. The second concerns the methods used to define and document the six month qualifying period. It is argued that the showings that are currently required present an overly restrictive interpretation of the Act and Rules. Many otherwise qualified radio operators who have served on United States Navy, Coast Guard or other Government owned or operated ships, or who have undergone special training programs at sea nevertheless do not qualify for the six months service endorsement. In fact, since 1982 only 50 six months service endorsements have been issued. Accordingly, we feel it is appropriate to review the requirements and procedures we use to determine that radio officers have the six months previous service mandated by Section 353(b) of the Act.

5. The requirement that the applicant for the six months endorsement be licensed by the Coast Guard during the entire qualifying period stems from the language of Section 353(b) and the definition of "radio officer" in Section 3(z)(1) of the Act. Section 353(b) states that six months experience *as a radio officer* is required, while "radio officer" is defined as a person holding a first or second class radiotelegraph operator license *and* a license issued by the Coast Guard when employed to operate a U.S. ship radiotelegraph station. Thus an applicant has been required to demonstrate that the six months of qualifying service was performed "as a radio officer," that is, with the applicable FCC and Coast Guard licenses.

6. The six month period mentioned in Section 353(b) has been defined in our Bulletin FO-7 to mean 8 hours per day for 180 days. Thus, an applicant has been required to demonstrate a total of 1440 hours of service as a radio officer. Detailed documentation is submitted by the applicant and examined by the Commission's staff to confirm that the 1440 hours qualifying service standard has been satisfied.

7. *Discussion*. We have carefully reviewed the history of Sections 353(b) and 3(z)(1) of the Act, as well as the Rules and licensing procedures, in light of the changing technology in maritime communications. Although current policies and practices have represented a reasonable interpretation of the Commission's statutory mandate, we believe the six months service endorsement prerequisites are more restrictive than necessary today. The Rules and prac-

tices applicable to this endorsement can be relaxed somewhat and the private sector can be permitted to play a greater role in certifying the qualifying service consistent with the letter and spirit of the Act.

8. Prior to 1965, the words "qualified operator" were used in Section 353(b) rather than "radio officer." This change in wording was made to conform to language used in the International Convention for the Safety of Life at Sea (Safety Convention).[4] The definition of "radio officer" was also added to Section 3 in 1965. Further, this definition cross-references the Coast Guard Merchant Marine officers licensing requirements adopted in "the Act of 1948 (46 U.S.C. 229 a-h)." These requirements are implemented by Subpart 10.13 of the Coast Guard's Rules, 46 C.F.R. § 10.13-1 *et seq*. They require the applicant for a Coast Guard radio officer's license to hold an FCC first or second class radiotelegraph operator's certificate and to meet certain age, citizenship and character requirements. These provisions classify radiotelegraph operators as licensed officers for merchant marine manning purposes.[5] In the *Order*, FCC 81-95 (1981), the Maritime Services Rules were amended to define a "radio officer" as a person who in addition to holding a first or second class radiotelegraph operator's certificate also is employed on board a ship to operate a radiotelegraph station in compliance with Part II of Title III of the Act and who is licensed as a radio officer by the Coast Guard. The *Order* added Section 13.12(b) to the Rules to specify the requirements for the six months endorsement. Footnote 5 of the *Order* acknowledged that persons whose experience was limited to voyages on U.S. Government ships could not meet these requirements.

9. Thus a review of the statutory language and its implementation in the Rules reveals that the current requirements do not reflect the only reasonable interpretation of the Act. Neither the Act nor public safety seem to require that an applicant have a Coast Guard radio officer license during the entire six months qualifying service period. Section 3(z) of the Act, 47 U.S.C. § 153(z), does not exclude the possibility of meeting the six months experience requirement through service on United States Navy or Coast Guard vessels; it merely requires a person employed to operate a radiotelegraph station on a Title II, Part III vessel to hold a Coast Guard license. We request comments on whether this interpretation is consistent with the Act.

10. The meaning of the phrase "six months previous service in the aggregate" in Section 353(b) is not explained in the Act or legislative history. While a rigid mathematical formula -- such as 180 days x 8 hours/day = 1440 hours total service -- is a valid measure of service, so is any other reasonable measure of the plain meaning of the six months qualifying service provision. In itself 1440 hours of service does not guarantee shipboard safety or radio officer skill. This benchmark has been a satisfactory processing tool, but changes in the way ships communicate can lead to anomalous results. For example, under this interpretation time spent by an applicant on the navigation bridge of a ship (i.e., outside of the radio room) learning to use and maintain the ship's satellite terminal or other communications and electronic equipment located on the navigation bridge may not count toward the 1440 hours of service. Plainly our view of qualifying service must change to keep pace with the modernization of the merchant fleet.

11. We believe the intent of the six months service requirement is to insure that the radio officer on a ship is familiar with shipboard procedures. The requirement that a radio officer hold a first or second class radiotelegraph operator's certificate ensures that the individual has successfully completed a comprehensive examination covering communications theory and practice and can send and receive manual Morse code telegraphy. The six months service endorsement ensures that the individual is familiar with ship radio station procedures -- that the radio officer has his or her "sea legs." Our view is buttressed by the fact that the Act does not require either radio officer to have six months previous service if two are employed on the ship. In short, the six months requirement could be satisfied by a simple longevity test: six months assigned to a radio officer position on board a U.S. ship in active service. We believe such an approach would benefit the industry without compromising safety. Certainly such an approach is consistent with most longevity measurements. Service computation dates in most industries do not exclude weekends, holidays and vacations. For example, the service time required by the Navy for an individual to be eligible for advancement to the next higher rate (e.g., from Radioman second class to Radioman first class) is simply a measure of the time the individual has served in his or her current rate. The fact that the individual was on leave, in school or otherwise not performing the duties of a Radioman during a portion of this period is not considered.

12. We are not limiting our review of the six months service endorsement practices to the two areas briefly discussed above. Rather, as part of our continuing effort to eliminate unnecessary regulatory burdens, we propose to amend Parts 13 and 80 of the Rules to simplify both the substantive requirements and the documentation necessary for issuance of the six month service endorsement.

13. *Proposal.* Section 353(b) does not on its face mandate the restrictive interpretation currently incorporated in the Rules. radiotelegraph operator is only required to satisfy three prerequisites to work as the sole radio officer on board a cargo ship: (1) six months previous service, (2) as a radio officer, (3) on board U.S. ships. The Act does not define six months and does not require the experience be gained in a radio *telegraph* station. There is no reason that any one method of determining qualifying service should be frozen in time, ignoring new technologies and practices that improve maritime communications and safety. For example, many ships today utilize satellite or narrow-band direct-printing equipment as the primary mode of communication at sea. In addition to the required watch on a telegraphy frequency (500 kHz), large ocean going ships now must maintain a listening watch on telephony frequencies (2182 kHz and 156.800 MHz). We do not believe that the additional regulatory burdens now incorporated in the rules for the six months endorsement result in any increase in safety.

14. Therefore, consistent with Section 353(b) of the Act, we propose to amend Section 13.12 of the Rules to simplify and clarify the substantive requirements for the six months service endorsement.[6] First, the proposed Rule would require an applicant to serve as a *radio* operator. The applicant would no longer be required to serve as a *radiotelegraph* operator. Radiotelephone operators on large ocean-going ships accumulate sufficient shipboard experience. These ships, usually between 300 and 1600 gross tons in size, sail throughout the world. The radio operator must be familiar with operational practices and

procedures as well as applicable publications such as the International Telecommunication Union's List of Coast Stations and List of Ship Stations. Radio operators on board these radiotelephone ships are skilled and knowledgeable maritime communicators. Second, the ship or ships would be required *either* to be equipped with a radio station that complies with the provisions of Part II of Title III of the Act *or* to be operated by the United States Government. Service as a radio operator on a Navy or Coast Guard ship would qualify. Third, the ship or ships must have been in service during the period that applicant was assigned as a radio operator. Any portion of an in port period exceeding seven days must be excluded from the aggregate six months qualifying period; otherwise, time that the ship was in port or at anchor could be counted. This requirement is meant to reflect normal ship operations and be consistent with the manner longevity provisions are computed in other industries where weekends, holidays and vacations are included. We seek comments, however, on whether the Rules can be further relaxed to include time spent in classroom or other training programs when the in port period exceeds seven days. Fourth, the applicant must have held a *first or second class radiotelegraph* operator's certificate during the entire six month qualifying period. This certificate ensures that the applicant is technically qualified and can send and receive manual Morse code from the day he or she began the shipboard familiarization service. Fifth, the applicant must hold a radio officer's license issued by the Coast Guard *at the time the six months endorsement is requested*. The Coast Guard license reflects the status of radio operators under merchant marine manning requirements. The technical ability, skill or knowledge of the individual in communication matters is not at issue. The Coast Guard requires an applicant for a radio officer's license to have an FCC first or second class radiotelegraph operator's certificate as proof of professional qualifications. Thus, there is no need for an applicant for the six months endorsement to have had a Coast Guard radio officer's license from the first day of the qualifying service period.

15. Further, we propose to amend the Rules to permit a ship station licensee (owner/operator), master or commanding officer to certify that the radio officer has satisfied the six months qualifying service requirements described above. We believe that these parties have strong incentives to verify the competency of their radio officers. Safety, legal and economic considerations involved in the operation of large ocean-going ships combine to insure these parties would act responsibly. We note that the Rules now permit an even more flexible self-certification of the six months qualifying service. As stated in para. 3, Section 13.12(b)(3) of our Rules permits the applicant to certify under oath that the six months service requirement has been met in the event documentary evidence cannot be produced. Allowing the owner, operator, master or commanding officer of a ship to certify that the six months qualifying service has been performed will continue to meet the safety purposes of Section 353(b) and reduce the regulatory burden currently encountered by the applicant, industry and the Commission.

16. We also propose to amend Section 80.157 of our Rules, 47 U.S.C. § 80.157, to define "radio officer" as it is defined in the Act. This is intended to be consistent with the actions described above and to avoid the circular argument that the definition of "radio officer" in the Rules requires the six months qualifying services to be performed only while employed as a radio *telegraph* operator with a license issued by the Coast Guard.

17. Although we feel that the approach proposed strikes a reasonable balance between the responsibility retained by the Commission and the authority delegated to the private sector, we are willing to entertain comments on whether any Commission overview of the six months qualifying service certification is required. Should the ship station licensee, master or commanding officer be permitted to issue a certification of six months qualifying service without the need for a license endorsement by the Commission? Would these parties have adequate incentive to ensure that a radio officer complied with the requirements of Section 353(b)? Should an independent entity be authorized to issue such an endorsement? Would such an independent endorsement be deemed a proper Commission delegation of responsibility? *Cf. Southern Bell Telephone and telegraph Company* v. *FCC*, 781 F.2d 209 (D.C. Cir. 1986) at n. 9. Other government agencies utilize the private sector to certify whether applicants meet specified standards. For example, the Federal Aviation Administration authorizes private examiners to conduct flight tests and uses designated airworthiness representatives to perform certain maintenance, manufacturing and engineering inspections. The Coast Guard utilizes the American Bureau of Shipping, an international classification society, to conduct certain inspections and certification of U.S. ships. However, such programs often include fees for the applicant and burdens on the government to designate and certify the authorized private sector entities. Would the Commission need to designate and/or certify such entities? Are the benefits of such a program worth the burdens?

18. *Conclusion*. This *Notice of Proposed Rule Making* is issued under the authority contained in Sections 4(i) and 303(l) and (r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(l) and (r). Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules (47 C.F.R. §§ 1.415 and 1.419) interested parties may file comments on or before **April 8, 1988,** and reply comments on or before **April 25, 1988.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. To file formally in this proceeding, participants must file an original and five copies of all comments, reply comments and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original and nine copies must be filed. Comments and reply comments should be sent to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room (Room 239) of the Federal Communications Commission, 1919 M Street, N.W. Washington, D.C. 20054.

19. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time that commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that

the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

20. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) that summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

21. We certify that Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354, 5 U.S.C. § 605(b)) does not apply to these proposed Rules because, if promulgated, these Rules will not have a significant economic impact on a substantial number of small entities. The proposed Rule would relax the six months qualifying service certification procedures applicable to radiotelegraph operators seeking to serve as radio officers on large oceangoing cargo ships. Since 1982 the Commission has issued 50 six months service endorsements.

22. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to decrease the information collection burden the Commission imposes on the public. This proposed reduction in information collection burden is subject to approval by the Office of Management and Budget as prescribed by the Act.

23. A copy of this *NPRM* will be sent to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX

Parts 13 and 80 of Chapter 1 of Title 47 of the Code of Federal Regulations are proposed to be amended as follows:

A. Part 13 - Commercial Radio Operators

1. The authority citation for Part 13 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. In Section 13.12, paragraph (b) is proposed to be revised to read as follows:

§ 13.12 Additional requirements for first class radiotelegraph operator's certificate and six months service endorsement.

* * * * *

(b) * * *

(1) * * *

(2) To qualify for the six months service endorsement the applicant must show that:

(i) the applicant was employed as a radio operator on board a ship or ships of the United States for a period totalling at least six months;

(ii) the ship(s) was equipped with a radio station complying with the provisions of Part II of Title III of the Communications Act, or the ship(s) was owned and operated by the U.S. Government, for example the U.S. Navy or U.S. Coast Guard, and equipped with a radio station;

(iii) the ship(s) was in service during the applicable six month period; however, any portion of single in-port periods that exceed seven days must be excluded from the qualifying six month periods;

(iv) the applicant held a first or second class radiotelegraph operator's certificate issued by the FCC during this entire six month qualifying period; and

(v) the applicant holds a radio officer's license issued by the U.S. Coast Guard at the time the six month service endorsement is requested.

(3) To satisfy the showing required in paragraph (b)(2) above, the applicant must submit a document(s) signed by the ship station licensee (owner/operator), master or commanding officer of a U.S. ship(s) stating that the applicant performed the duties of a radio operator in a satisfactory manner under each of the conditions listed in paragraph (b)(2).

* * * * *

B. Part 80 - Stations in the Maritime Services 1. The authority citation for Part 80 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. 151-155, 301-609; 3 UST 3450, 3 UST 4726, 12 UST 2377, unless otherwise noted.

2. Section 80.157 is proposed to be revised to read as follows:

§ 80.157 Radio officer defined.

A "radio officer" means a person holding a first or second class radiotelegraph operator's certificate issued by the Commission who is employed to operate a ship radio station in compliance with Part II of Title III of the Communications Act. Such a person is also required to be licensed as a "radio officer" by the U.S. Coast Guard when employed to operate a ship radio *telegraph* station.

FOOTNOTES

[1] Section 353(b), 47 U.S.C. § 353(b), provides: "A cargo ship which in accordance with this part is equipped with a radiotelegraph station, which is equipped with a radiotelegraph auto alarm, shall, for safety purposes, carry at least one radio officer who shall have had at least *six months§ previous service in the aggregate* as a radio officer in a station on board a ship or ships of the United States." (Emphasis added.)

[2] *See* Section 13.12(b) of the Rules, 47 C.F.R. § 13.12(b) and FCC Field Operations Bureau Bulletin FO-7 titled "Radiotelegraph Operator's Certificates" (March 1987).

[3] For example, see the letter from Captain W. L. Straley to Chairman Patrick (July 28, 1987) and the letter from Jos. Dinsmore Murphy to Chairman Patrick (September 16, 1987).

[4] *See* Public Law 89-121, 79 Stat. 511 (1965).

[5] *See* S. Rep. No. 526, 89th Cong., 2nd Sess., reprinted in 1965 U.S. Code Cong. & Ad. News 2720.

[6] Section 13.12, 47 C.F.R. § 13.12, is titled "Additional requirements for first class radiotelegraph operator's certificate and six months service endorsement." Paragraph (b) contains the requirements for the six months service endorsement.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-206

In the Matter of

Amendment of Section 73.202(b),	RM-5086
Table of Allotments,	RM-5214
FM Broadcast Stations.	RM-5287
(Canton, Cartersville,	RM-5402
Douglasville, Villa Rica and	
Newnan, Georgia)	

REPORT AND ORDER

Adopted: January 25, 1988; Released: February 17, 1988

By the Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making*, 51 Fed. Reg. 20315, published June 4, 1986, proposing to:

a) substitute Channel 289C2 for Channel 288A and to modify the license of Station WCHK-FM, Canton, Georgia, to specify operation on the Class C2 channel;

b) allot Channel 289A to Douglasville, Georgia, as its first FM channel;[1]

c) allot FM Channel 289A to Villa Rica, Georgia;[2]

d) substitute FM Channel 289A for Channel 244A at Newnan and to modify the license of Station WBUS to specify operation on Channel 289A.[3]

The *Notice* was issued in response to four mutually exclusive petitions for rule making filed by Cherokee Broadcasting (Cherokee), licensee of Station WCHK-FM, Canton, Georgia; Hugh J. Wheeler (Wheeler) for Douglasville; Elizabeth Martin Henley (Henley) for Villa Rica and NewSystems of Georgia (NEWS) for Newnan. All of the above parties filed comments to the *Notice*. In addition, Shelley Broadcasting Company, Inc. (Shelley), licensee of Station WRJM(FM), Channel 289C, Troy, Alabama, filed opposing comments.

2. In the *Notice*, we stated that all four proposals warranted consideration. In Canton, the proposed substitution could provide expanded coverage which would allow Cherokee to improve service to its audience. Canton (population 3,601) is currently served by Stations WCHK(AM) and WCHK-FM. Regarding Douglasville and Villa Rica, the allotment of Channel 289A could provide either of these communities with their first local FM service. Douglasville (population 7,641) is currently served by Station WSPZ(AM). Villa Rica (population 3,420) currently has no local service. In Newnan, the proposed substitution of Channel 289A for Channel 244A would eliminate a short spacing relationship between Stations WBUS, Newnan and WKLS (Channel 241), Atlanta, and alleviate an allegedly severe intermodulation problem. Newnan (population 11,449) is currently served by WBUS(FM), WCOH(AM) and WNEA(AM).

Comments - Newnan

3. Regarding the Newnan proposal, NEWS alleged that no other non-short spaced channels are available to Newnan except Channel 289A, although this channel would cause an additional short spacing. NEWS argues that the Commission has previously approved channel substitutions to alleviate interference problems of the type involved here, citing *Milton, Florida*, 48 FCC 2d 112 (1974). NEWS also alleges that while the Commission has been reluctant to make channel substitutions which would result in the creation of new short spacings, citing *Tom's River, New Jersey*, 43 FCC 2d 414 (1972) and *Portland, Tennessee*, 35 FCC 2d 601 (1972), this policy should not apply where a severe grandfathered short spacing can be eliminated with only "marginal detrimental effects," citing *Chicago, Illinois*, 53 FCC 2d 1142 (1975).

4. NEWS supports the substitution of Channel 289A for Channel 244A at Newnan, Georgia. In its counterproposal, NEWS proposes that the Commission also allot Channel 244A to Fairfax, Alabama, as its first local service. In addition, NEWS states that its President, Ragan Henry or a company controlled by him will apply for a construction permit in Fairfax, if Channel 289A is allotted to Newnan. NEWS argues that its counterproposal presents an opportunity to eliminate an existing short spacing and to provide a first local service. NEWS further argues that the above benefits outweigh those presented by the above proposals. Specifically, NEWS contends that Douglasville already has local service and receives additional service from Atlanta; Villa Rica is smaller than Fairfax, and is served by Atlanta area stations, citing, *Taylorsville, Mississippi*, 53 RR 2d 1634 (1983); and *Dayton, Ohio*, 59 RR 2d 1676 (1986).

5. Shelley opposes the allotment of a short spaced Channel 289A to Newnan without requiring the proponent to relocate its transmitter site or imposing site restrictions to protect its Station WRJM(FM), Channel 289A, Troy, Alabama, citing, *Millington, Maryland* 45 RR 2d 1689 (1970); *Portland, Tennessee, supra* and *Toms River, New Jersey, supra*. Shelley contends that there is no evidence to support the conclusion that the overlap of Station WBUS's service contour with Station WRJM's existing interference free service area will not cause any "actual interference" to Station WRJM. To the contrary, Shelley claims that interference will be caused. Wheeler also agrees that the Newnan proposal will create new short spacing to Station WRJM(FM). Wheeler alleges that the interference WBUS receives from Station WKLS(FM) Atlanta, is not the result of grandfathered short spacing, but due to a voluntary transmitter relocation of WBUS approximately 7.7 miles toward Station WKLS. Wheeler claims that Station WBUS's short spacing could be reduced if its transmitter site were relocated southwest of Newnan. Lastly Wheeler argues that in light of the above factors, the apparent public interest benefit of the Newnan proposal in partially eliminating interference received by Station WBUS from Station WKLS(FM), Atlanta and Station WFOX(FM), Gainesville, Florida, is severely diminished.

6. In reply comments, NEWS reiterates that its proposed allotment will not result in interference to Station WRJM. NEWS further states that it did not cause Station WBUS'

current condition, rather the prior licensee did. NEWS explains that it was understood when Station WBUS was purchased, that the antenna and transmitter had to be relocated from the site owned by the former licensee. Finally, NEWS states that the move was designed to eliminate the unique problem caused by Station WBUS' operation on to a frequency between two Class C stations, one severely short spaced.

7. In its reply, Cherokee questions whether adequate public notice would exist to make the proposed allotment to Fairfax in the present proceeding. Cherokee also questions the use by NEWS of a proposed allotment to Fairfax as a means of enhancing its comparative position. Cherokee contends that the proposed site for Fairfax lies in a buffer zone area for three different existing Class C stations. Wheeler questions NEWS' motives for proposing the allotment to Fairfax. Finally, Henley points out that Channel 239A can be allotted to Fairfax without affecting the proposals in this proceeding. Therefore, it argues that NEWS' counterproposal does not add anything to the public interest factors on which this proceeding must be decided.

Canton

8. Cherokee supports the substitution of Channel 289C2 for Channel 288A at Canton, and the modification of Station WCHK-FM's license. Cherokee contends that its proposal could provide a second nighttime aural service to an estimated 17,000 people. In opposition, Wheeler notes that the proposals for Douglasville and Villa Rica have priority over the Canton and Newnan proposals since the former proposals could provide a first fulltime local service to those communities.

9. In its opposition, Henley argues that Cherokee has not provided any evidence to support its claim that a Class C2 operation could provide a second nighttime aural service to more than 17,000 people in a 253 square mile area. Henley claims that the area already receives a second nighttime service from WSB(AM), Atlanta and noncommercial educational station, WMBW-FM, Chattannooga, Tennessee. NEWS argues that it is irrelevant that Cherokee will provide service to a small nighttime "gray area" since an allotment to either Villa Rica or Fairfax could provide a first local service.

Douglasville

10. Wheeler states that the proposals for Douglasville and Villa Rica have priority over the Canton and Newnan proposals since they could provide a first local service to these communities. Wheeler notes that of the two communities, Villa Rica is the smaller community with a 1980 census population of 3,389. Douglasville had a 1980 census population of 7,641. Wheeler further notes that if Channel 289A is allotted to Douglasville, a site selected to provide city grade coverage to Douglasville could also provide city grade coverage to Villa Rica. However, Wheeler points out that if Channel 289A is allotted to Villa Rica, a site could not be located in such a way as to provide a city grade signal to Villa Rica, while simultaneously providing primary service coverage to Douglasville. As an alternative, Wheeler proposes that the Commission allot Channel 289A to Douglasville-Villa Rica on a hyphenated basis.

Villa Rica

11. Henley reiterates that her proposal to allot Channel 289A to Villa Rica could permit establishment of a first local broadcast service there. Henley states that the Commission has established that proposals which would bring a first fulltime local service to a significant population would merit a preference in a comparative FM proceeding over a proposal to establish a second nighttime aural service (Canton) or a first fulltime local service, (Douglasville) citing *Revision of FM Assignment Policies and Procedures* 90 FCC 2d 88 (1982); *recon. denied*, 56 RR 2d 448 (1984).

12. In reply comments, Cherokee notes that Villa Rica is a suburb of Atlanta. Cherokee argues that although the allotment of Channel 289A will result in first local service, since Channel 289C2 in Canton will provide second aural service to a larger population, Canton should be preferred, citing *Revision of FM Assignment Policies and Procedures*, *supra*.

Discussion

13. Regarding requests for changes in the allotment for existing stations which might result in improved spacing situations, in the *Third Further Notice of Proposed Rule Making* in Docket No. 14185, 29 Fed. Reg. 2385, published February 12, 1964 (overall FM allocation proceeding), the Commission noted several situations where these types of requests could be granted: (a) where a proposed change would eliminate all short spacing problems without creating new problems or require the deletion of any existing or proposed allotment; or (b) where a change would substantially improve one or more short spacings without creating a new problem.

14. The Commission also stated that in some limited cases, change may be approved where there is a slight worsening of the position of one or more stations, if the parties requesting the change could show that there is marked net improvement in the overall allotment picture. However, the Commission concluded that it would not modify existing or proposed allotments so as to create a short spaced station or allotment where none existed before. We believe that is the situation here.

15. We agree with opposing commentors that adoption of NEWS proposal to use FM Channel 289A at Newnan would not be in the public interest since it would create new short spacing to an existing station. NEWS claims that the channel change would eliminate interference from WKLS and also intermodulation interference throughout the market from other Atlanta area stations. While improvements in WBUS' position is desirable, we cannnot overlook two facts. First, a new short spacing will be created by NEWS' proposal. Secondly, the interference NEWS is seeking to eliminate is outside of its protected 1 mV/m service area.

16. Section 73.207 provides for protection from interference to a station's 1 mV/m contour based on minimum distance separation standards. Specifically, Section 73.207 requires a spacing of 105 km. between a Class A and a Class C station (WBUS and WKLS). In the present situation, there is no overlap of WKLS's interfering contour with WBUS's 60 dbu service contour. In fact, there is a 19 km. gap between the two contours. Section 73.207 does not protect against interference *per se* as long as these distance separation requirements are met. A staff analysis shows that while the interference complained of by NEWS does in fact exist, it is considerably outside its service area. The study further notes that a problem arises here, be-

cause WBUS is attempting to cover Atlanta, which is outside its primary service area. Absent unique circumstances beyond desiring to expand its coverage to serve a nearby community, the Commission is under no obligation to consider the request. This is particularly true in light of mutually exclusive proposals that would provide preferred service under our allotment priorities.

17. Regarding the new short spacing that would be created by the NEWS proposal, NEWS tries to overcome this fatal flaw in its proposal by proposing the allotment of Channel 244A to Fairfax and the promise that if its proposal for Newnan is granted, its president will apply for the new channel in Fairfax. While the proposal for Fairfax could provide a first local service to that community, that proposal is of no consequence, since NEWS' interest is conditioned on the grant of the Newnan proposal which is being denied in the instant case.

18. We believe this case is more akin to situations such as *Eatontown, New Jersey*, 1 FCC 2d 739 (1965); *Skokie, Illinois*, 3 FCC 2d 921 (1966); *Toms River, New Jersey*, 43 FCC 2d 414 (1973) and *Charlotte, North Carolina*, Mimeo No. 1447, released December 13, 1985. In each situation, the Commission rejected proposals which would create a new short spacing in order to accommodate proposed channel allotments or substitutions. While the public may benefit generally by an improvement of service and Station WBUS will benefit by expanding its coverage area, we cannot ignore the fact that the substitution of Channel 289A for Channel 244A will cause new interference to Station WRJM, in Troy, Alabama.

19. As we stated in *Portland, Tennessee*, 35 FCC 2d 601 (1972), "while we have on occasion granted requests for waiver of the minimum mileage requirements, this has only been done in connection with applications for existing channels . . . .In rule making, on the other hand, we have never granted such waiver, for to do so would be to knowingly undermine the very objectives we are attempting to serve." *See* also, *Vass, North Carolina*, 45 RR 2d 1741 (1979).

20. The Commission staff has determined that no other channel is available for allotment to Canton, Douglasville or Villa Rica. Consequently, the above decision is based on the allotment priorities set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). These priorities are:

(1) First full time aural service
(2) Second full time aural service
(3) First local service
(4) other public interest matters
Co-equal weight given to priorities (2) and (3).

21. In its comments, Cherokee stated that the proposed substitution at Canton would provide expanded coverage, which will allow Cherokee to improve service to its audiences. Specifically, Cherokee alleged that its expansion to Channel 289C2 would provide *second aural service* to approximately 17,167 persons in a 253 square mile area. A Commission staff analysis verifies this area claimed by Cherokee[4] and the provision of a second aural service (priority two).

22. The allotment of Channel 289A to Douglasville could provide a first fulltime local FM service (priority four). Station WSPZ(AM) (daytime only) is already licensed to Douglasville. Therefore, the Canton proposal (priority two) is preferred over the proposal for Douglasville (priority four).

23. The allotment of Channel 289A to Villa Rica could provide a first local service (priority three) to that community. Since communities under priorities two and three are weighted equally, we shall consider the proposals for Canton and Villa Rica based on the populations to be served.

24. In accordance with these factors, we find that the public interest would best be served by substituting Channel 289C2 for Channel 288A at Canton. The number of persons that will receive a second aural service as a result of WCHK-FM's expanded coverage is far greater (17,167) than the number of persons in Villa Rica (3,420) which could receive a first local service. As an alternative, the proponents for Douglasville and Villa Rica have urged that the Commission consider allotting Channel 289A to the combined communities of Douglasville-Villa Rica as a hyphenated allotment. However, hyphenation is an allotment tool which we have used very sparingly. In the past, we have done so only where it appeared that the communities should be as one due to the nearness and mutual economic, cultural and social interdependence. Furthermore, we generally require a showing that none of the communities alone could support a station. *Gardnerville - Minden, Nevada*, 48 RR 2d 1700 (1981). While Douglasville and Villa Rica are located close to each other, each is listed as a separate town in the 1980 U.S. Census. Furthermore, we have not been provided with a showing that either community lacks its own services or that the two communities are so intertwined as to have lost their individual characteristics. Even if the two communities were considered jointly, Cherokee's proposal would still be preferred, since it could provide a second aural service to a larger population. *See* , e.g. *Booneville, New York, et. al.*, 50 Fed. Reg. 40395, published October 3, 1985, and *Guadalupe, California, et. al.*, 49 Fed. Reg. 5757, published February 15, 1984.

25. In view of the above discussion, Channel 289C2 will be substituted for Channel 288A at Canton and the license of Station WCHK-FM, will be modified to specify operation on Channel 289C2. The allotment of Channel 289C2 to Canton will require a site restriction of 9.2. kilometers (5.7 miles) west update to avoid short spacing to Stations WPCH(FM) Channel 235, Atlanta, Georgia and WLET-FM, Channel 291 Toccoa, Georgia.

26. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 4, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with regard to the community listed below, as follows:

City	Channel No.
Canton, Georgia	289C2

27. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Cherokee Broadcasting for Station WCHK-FM, Canton, Georgia, IS MODIFIED effective to specify operation on Channel 289C2 in lieu of Channel 288A, subject to the following conditions:

(a) Within 90 days of the effective date of this Order, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.301 of the Commission's Rules.

28. IT IS FURTHER ORDERED, That the petition of Hugh J. Wheeler for Douglasville, Georgia, IS DENIED.

29. IT IS FURTHER ORDERED, That the petition of Elizabeth Martin Henley for Villa Rica, Georgia, IS DENIED.

30. IT IS FURTHER ORDERED, That the petition of NewSystems of Georgia for Newnan, IS DENIED.

31. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

32. FOR FURTHER INFORMATION concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] In the *Notice*, we noted that the distance between Douglasville and Canton is approximately 60 kilometers. The required distance between co-channel Class C2 and Class A stations is 163 kilometers. The Commission's staff has determined that no other channel is available for allotment to Douglasville or Canton. Thus the proposals are mutually exclusive and will be considered together.

[2] The distance between Douglasville and Villa Rica is 16.2 kilometers. The required distance between co-channel Class A stations is 105 kilometers. The distance between Villa Rica and Canton is approximately 68.7 kilometers. As noted in footnote 1, the required distance between co-channel Class C2 and Class A stations is 163 kilometers. No other channel has been found for Villa Rica. Thus, these two proposals are also mutually exclusive.

[3] The distance between Newnan and 1) Douglasville, 2) Canton, and 3) Villa Rica is 41.7 kilometers, 99.6 kilometers, and 41 kilometers respectively. Thus all of these proposals are mutually exclusive.

[4] This area is also served by WSB(AM). The service of noncommercial educational station (WMBW-FM, Chattanooga, Tennessee) is not recognized in the calculation of second aural service.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-307

In the Matter of

Amendment of Section 73.202(b), RM-5909
Table of Allotments,
FM Broadcast Stations.
(Wadesboro, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 26, 1988; Released: February 17, 1988

By the Chief, Allocations Branch:

1. At the request of Justine Hope Lambert (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 5305 (1987), proposing the allocation of Channel 228A to Wadesboro, North Carolina, as the community's first local FM service. Petitioner filed comments reiterating her intention to apply for the channel, if allocated. Channel 228A can be allocated to Wadesboro in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.8 kilometers (6.1 miles) northwest to avoid a short-spacing to Station WZNS, Channel 225C, Dillon, South Carolina.[1]

2. We believe the public interest would be served by allocating Channel 228A to Wadesboro since an interest has been expressed in providing the community with its first local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 4, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Wadesboro, North Carolina	228A

3. The window period for filing applications will open on **April 5, 1988,** and close on **May 5, 1988.**

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are: North Latitude 35o, 01', 29"; West Longitude 80o, 09', 06".

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-321

In the Matter of

Amendment of Section 73.202(b),	RM-5781
Table of Allotments,	
FM Broadcast Stations.	
(Ashland, Oregon)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 22, 1988; Released: February 17, 1988

By the Chief, Allocations Branch:

1. At the request of Rogue Radio Corporation (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 5192 (1987), proposing the substitution of Class C Channel 270 for Channel 270C1 at Ashland, Oregon, and the modification of its license for Station KCMX-FM to specify the higher powered channel. Supporting comments were filed by the petitioner. No other comments were received.

2. We believe the public interest would be served by substituting Channel 270C for Channel 270C1 since it could enable expanded service to Ashland and the surrounding area. Channel 270C can be allocated to Ashland in compliance with the Commission's minimum distance separation requirements and can be used at Station KCMX-FM's present transmitter site.[1] As proposed, we shall also modify the license of Station KCMX-FM to specify operation on Channel 270C.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 4, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Ashland, Oregon	270C

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Rogue Radio Corporation for Station KCMX-FM, Ashland, Oregon, IS MODIFIED, effective **April 4, 1988,** to specify operation on Channel 270C, in lieu of Channel 270C1, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for this allotment are: North Latitude 42o, 17', 54"; West Longitude 122o, 44', 59".

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-262

In the Matter of

Amendment of Section 73.202(b),	RM-5295
Table of Allotments,	RM-5344
FM Broadcast Stations.	
(Cape Vincent, New York)	

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: January 14, 1988; Released: February 17, 1988

By the Chief, Allocations Branch:

1. The Commission has before it the Petition for Partial Reconsideration filed by Mars Hill Broadcasting Company, Inc. (petitioner) of the *Report and Order*, 2 FCC Rcd 3274 (1987), which allocated Channel 274A to Cape Vincent, at the request of Timothy J. Martz but denied petitioner's request for the allotment of Channel 234A to Cape Vincent.[1] As stated in the *Report and Order*, the allotment of Channel 234A at Cape Vincent conflicted with a previously filed Canadian request to allocate Channel 233A to Brockville, Ontario, Canada.[2]

2. Petitioner states that it was not aware of the conflict with the Canadian proposal until the Commission issued the *Report and Order* in this proceeding. It submits that it has determined that Channel 234A can be allocated to Cape Vincent in compliance with the Commission's minimum distance separation requirements to all domestic allotments and can protect the Canadian proposal for Channel 233A at Brockville with the use of a directional antenna. [3]

3. We have determined that Channel 234A can be allocated to Cape Vincent in compliance with the Commission's minimum distance separation requirements without a site restriction.[4] However, the station must use a directional antenna limiting the radiation towards Station CBBB-FM, Belleville, Ontario, Canada, to 0.75 kW ERP with a height above average terrain of 100 meters, or the equivalent, on the radial towards Belleville. Use of the directional antenna will provide the required protection to the Belleville station and to Station CIMF-FM, Hull, Quebec. Canadian concurrence in the allocation of Channel 234A to Cape Vincent, as a specially negotiated short-spaced allotment, has been received.

4. We believe that the public interest would be served by allocating Channel 234A to Cape Vincent, New York, as an interest has been expressed in providing the community with its second local FM service. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 4, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Cape Vincent, New York	234A, 274A

5. The window period for filing applications will open on **April 5, 1988,** and close on **May 5, 1988.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] There are presently two applications on file for Channel 274A at Cape Vincent.

[2] The *Report and Order* erroneously referred to the community as Brookville.

[3] By letter of November 18, 1987, we have been informed by the Canadian Government that it has withdrawn its proposal for Channel 233A at Brockville.

[4] The coordinates for Cape Vincent are: North Latitude 44o, 07', 30"; West Longitude 76o, 20', 12".

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-416

In the Matter of

Amendment of Section 73.202(b), RM-5112
Table of Allotments,
FM Broadcast Stations.
(Keokuk, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 14, 1988; Released: February 17, 1988

By the Chief, Allocations Branch:

1. At the request of W. Russell Withers, Jr. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 1 FCC Rcd 488 (1986), proposing the substitution of Channel 290C2 for Channel 237A at Keokuk, Iowa, and the modification of its license for Station KOKX(FM) to specify the higher powered channel. Comments supporting the allotment were filed by the petitioner. In addition, Patrick Michael Sullivan (Sullivan), filed comments expressing an intention to apply for Channel 290C2, if allocated to Keokuk. Comments in opposition were filed by Contemporary Broadcasting, Inc. (Contemporary), licensee of Station KFMZ(FM), Channel 252A, Columbia, Missouri, and Columbia FM, Inc. (Columbia FM), licensee of Station KARO(FM), Channel 269A, Columbia, Missouri.[1] Petitioner, in reply comments, filed a counterproposal suggesting the upgrading of Station KOKX(FM) on cochannel 237C1 and related changes at Washington, Iowa, Pittsfield, Illinois, and Pekin, Illinois.[2]

2. As stated in the *Notice*, petitioner's proposal was not considered to be an adjacent channel upgrade. In reviewing the record before us, we note that Channels 237 and 290 are 53 channels removed and in accordance with Section 73.207 of the Rules require a separation of 16 kilometers to avoid causing IF interference. However, Channel 290C2 can be allocated to Keokuk without requiring the deletion of Channel 237A if the higher powered channel is site restricted at least 16.7 kilometers (10.4 miles) southwest. Therefore, petitioner's license for Station KOKX(FM) cannot be modified to Channel 290C2 absent the availability of an additional equivalent channel to accommodate the competing expression of interest filed by Sullivan.

3. In an effort to accommodate both parties, the staff has performed a channel search and found that an additional equivalent channel can be allocated to Keokuk. Channel 242C2 can be allocated to Keokuk with a site restriction of 6.0 kilometers (3.7 miles) northwest to avoid a short-spacing to Station KRJY, Channel 242C1, St. Louis, Missouri. Since no interest in use of Channel 237A has been expressed, we shall not retain the channel at Keokuk. Therefore, Channel 290C2 can be allocated to Keokuk with a lesser site restriction of 9.6 kilometers (6.0 miles) west to avoid a short-spacing to Station WWCT, Channel 289B, Peoria, Illinois.[3]

4. We believe the public interest would be served by substituting Channel 290C2 for Channel 237A at Keokuk since it could provide the community with its first local wide coverage area FM service. In addition, we believe the public interest would be served by allocating Channel 242C2 to Keokuk since an interest has been expressed in providing the community with an additional wide coverage area service. As proposed, we shall also modify petitioner's license for Station KOKX(FM) to specify operation on Channel 290C2.

5. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 4, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Keokuk, Iowa	242C2, 290C2

6. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of W. Russell Withers, Jr. for Station KOKX(FM), Keokuk, Iowa, IS MODIFIED effective **April 4, 1988,** to specify operation on Channel 290C2, in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

7. The window period for filing applications for Channel 242C2 at Keokuk will open on **April 5, 1988,** and close on **May 5, 1988.**

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Columbia FM had filed a petition for rule making requesting, in part, the substitution of Channel 290C2 for its Channel 269A, and the modification of its license to specify the higher powered channel. Contemporary also filed a rule making request to substitute Channel 290C2 for Channel 249A at Fulton, Missouri, in order to enable its Station KFMZ to be upgraded from Channel 252A to Channel 250C2. These petitions were returned by the staff as unacceptable for consideration and each sought reconsideration of that action. The Commission has now issued a *Notice of Proposed Rule Making* on the Contemporary rule making request proposing the substitution of Channel 252C2 for Channel 252A at Columbia, Missouri, and the substitution of Channel 263A for Channel 249A at Fulton, Missouri (MM Docket 87-493, 2 FCC Rcd 6959 (1987)). As stated therein, its earlier proposal for Channel 290C2 at Fulton would not comply with the Commission's minimum distance separation requirements in that the proposed allotment would be 138.5 kilometers from the site specified in the construction permit of Station KSGM-FM, at St. Genevieve, Missouri, instead of the required 188 kilometers. The Commission has also issued a *MemorandumOpinion and Order*, DA 87-1580, 2 FCC Rcd 6764 (1987), denying the reconsideration request of Columbia FM. Therefore, the pleadings which each party submitted herein are moot and will not be considered.

[2] Petitioner's counterproposal is not considered herein as it was untimely filed. As stated in paragraph 3 of the Appendix thereto, counterproposals must be advanced in comments so that other parties may comment on them. Such proposals will not be considered if submitted in reply comments.

[3] The coordinates for Channel 242C2 are: North Latitude 40o, 26', 30"; West Longitude 91o, 26', 17". The coordinates for Channel 290C2 are: North Latitude 40o, 23', 58"; West Longitude 91o, 30', 35".

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Request of

ITT CORPORATION

For a Declaratory Ruling Concerning
Section 310(b)(4) of the
Communications of 1934

MEMORANDUM OPINION AND ORDER

Adopted: February 5, 1988; Released: February 18, 1988

By Chief, Domestic Facilities Division:

1. ITT Corporation (ITT) requests a declaratory ruling that Bertil T. Nilsson, a citizen of Sweden, may serve as Vice President of ITT. ITT is a multi-national corporation that is engaged in a wide variety of domestic and international business activities, including telecommunications. ITT has a number of subsidiaries which hold Commission authorizations.

2. On January 15, 1988, the Commission issued a public notice (mimeo number 1291) regarding ITT's request for a declaratory ruling and invited interested parties to file comments. No comments have been received.

3. Section 310(b)(4) of the Communications Act of 1934, as amended, provides that radio licenses shall not be granted to or held by:

> any corporation directly or indirectly controlled by any other corporation of which any officer or more than one-fourth of the directors are aliens . . . if the Commission finds that the public interest will be served by the refusal or revocation of such license.

4. The restrictions in Section 310 of the Act reflect security concerns and are designed to prevent the participation of aliens in certain domestic radio activities. In the case of a parent corporation owning or controlling a corporate licensee, an absolute prohibition does not apply, but the Commission may, in effect, still prohibit aliens from serving as officers of such a parent company if it finds that such a prohibition in any given instance would be in the public interest and that an individual's election as officer would require radio license revocation or denial of renewal. *See International Telephone and Telegraph Corp.*, 67 FCC 2d 604 (1978).

5. ITT states in its request that it is desirous of electing Mr. Nilsson as Vice President. At the present time ITT has approximately 25 executives who hold the title of Vice President. Mr. Nilsson does not presently have or will have in the future any control or supervision over the operating telecommunications subsidiaries of ITT.

6. In light of the facts contained in ITT's request, we do not find that the election of Mr. Nilsson as a Vice President of ITT would warrant refusal or revocation of Commission authorizations held by or applied for by its subsidiaries.

7. Accordingly, IT IS ORDERED, pursuant to delegated authority, 47 C.F.R. § 0.291, that the request for declaratory ruling IS GRANTED, and that the election of Bertil T. Nilsson, a citizen of Sweden, will not adversely affect the public interest, provided, however, that he does not exercise any control over or supervision of any ITT subsidiary holding common carrier authorizations or otherwise subject to Section 310 of the Communications Act of 1934.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Petition for Rule Making to Establish Minimum Service Lives for New Technology Plant Including Digital and Fiber Optic Facilities	RM-4932

ORDER

Adopted: February 5, 1988; Released: February 18, 1988

By the Chief, Common Carrier Bureau:

1. On December 18, 1987, the Ameritech Operating Companies (Ameritech)[1] filed a "Notice of Withdrawal" of Ameritech's January 23, 1985 "Petition for Rule Making" in this proceeding. Ameritech seeks to withdraw its petition, "without waiving [its] rights to file the same Petition with updated supporting data or a similar request at a later date."[2] Ameritech's notice, which was served on the parties to this proceeding, is unopposed.

2. Consistent with Commission policy, we will treat Ameritech's notice as a request that we dismiss its petition without prejudice. Upon review of the record in this proceeding, we find that such a dismissal would serve the public interest.

3. Accordingly, IT IS ORDERED, pursuant to Section 0.291 of the Commission's Rules, [3] that the subject Petition for Rule Making IS DISMISSED without prejudice.

4. IT IS FURTHER ORDERED that this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The Ameritech Operating Companies consist of Illinois Bell Telephone Company; Indiana Bell Telephone Company, Incorporated; Michigan Bell Telephone Company; The Ohio Bell Telephone Company; and Wisconsin Bell, Inc.

[2] Ameritech Notice of Withdrawal at 1.

[3] 47 C.F.R. § 0.291.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Chesapeake and Potomac
Telephone Company of
Maryland

ORDER

Adopted: January 26, 1988; Released: February 18, 1988

By the Commission:

1. On December 7, 1987, the United States Court of Appeals for the District of Columbia Circuit issued an Order in Hecht Company v. Federal Communications Commission, No. 87-1396, directing this Commission to vacate our decision there under review.[1]

2. Accordingly, IT IS ORDERED that this Commission's Memorandum Opinion and Order in the above-captioned proceeding, FCC 85-465, and this Commission's Memorandum Opinion and Order on Reconsideration, FCC 87-169, ARE VACATED, as moot.

3. IT IS FURTHER ORDERED that the request for declaratory ruling filed on August 20, 1982 by Chesapeake and Potomac Telephone Company of Maryland IS DISMISSED, as moot.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTE

[1] Chesapeake and Potomac Telephone Company of Maryland, Memorandum Opinion and Order, FCC 85-465, released Aug. 16, 1985, *recon. denied*, FCC 87-169, 2 FCC Rcd 3528 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Annual 1987 Access Tariff Filings

MEMORANDUM OPINION AND ORDER ON REVIEW

Adopted: January 26, 1988 ; Released: February 18, 1988

By the Commission:

I. INTRODUCTION

1. On December 31, 1986, the Common Carrier Bureau released a Memorandum Opinion and Order as part of its review of the annual 1987 access tariffs filed by the local exchange carriers (LECs) pursuant to Section 69.3 of this Commission's Rules, 47 C.F.R. § 69.3(a).[1] The Order addressed the revisions to the rates for special access services filed by the LECs as well as revisions to the terms and conditions applicable to both switched and special access services.[2] The Bureau designated some rates for investigation and declined to investigate others. The Bureau also suspended some charges that were designated for investigation and declined to suspend others.[3]

2. Applications for review of the *December 31 Order* have been filed by the Ad Hoc Telecommunications Users Committee (Ad Hoc) and the Western Union Telegraph Company (Western Union). [4] Ad Hoc seeks "clarification and/or review" of the Bureau's actions relating to strategically-set rates for special access High Capacity Service (HiCap) and Digital Data Service (DDS) and revised non-recurring charges (NRCs). Ad Hoc does not challenge the Bureau's decision to include all revised HiCap, DDS and NRC charges in the ongoing CC Docket No. 85-166 special access investigation[5] or the Bureau's decision to suspend some of those revised charges. Ad Hoc contends that the Bureau erred in denying the Ad Hoc petition to reject or suspend the remaining HiCap, DDS and NRC charges. Western Union seeks review of the *December 31 Order* insofar as the Bureau declined to institute an investigation of the separations and cost allocation procedures underlying the annual 1987 special access tariff filings. As discussed below, we will deny the applications for review.

II. AD HOC APPLICATION FOR REVIEW

A. *Strategic Pricing*

1. *Pleadings*

3. In their 1985 access tariff filings, several of the LECs proposed rates for their HiCap and DDS services at levels designed not only to reflect relative costs, but also to reflect certain marketing or strategic considerations. The Bureau denied petitions to reject the 1985 tariff rates, but decided to expand the CC Docket No. 85-166 investigation to determine the legality of such strategic pricing.[6] This Commission affirmed that Bureau decision.[7] We rejected Ad Hoc's claims that the Bureau departed from Commission precedent or otherwise erred in denying petitions to reject rates that reflect strategic pricing. We observed:

> "The Bureau merely found that the strategic pricing did not of itself require outright rejection of the proposed access tariff revisions . . . Moreover, the Bureau clearly stated that this action did not constitute approval of the tariff filings and, in the case of the special access tariffs, concluded that the question of basing these rates on other than cost considerations should be investigated."[8]

4. A few weeks later, the LECs filed annual 1987 access tariff filings. Several of the LECs proposed to increase the strategically priced HiCap and DDS rates that were already subject to investigation. A number of these rates were targeted to achieve rates of return in excess of the overall category rate of return (12 percent) ranging from approximately 20 percent to nearly 60 percent.[9]

5. In its review of the 1987 special access tariffs, the Bureau concluded, with certain exceptions, that the revised LEC strategic rates did not warrant either rejection or suspension, but should be included in this Commission's ongoing investigation of special access strategic pricing in CC Docket No. 85-166. It suspended those proposed strategic rates for HiCap and DDS projected to achieve earnings well above the range of most other rates for these services -- generally those targeted to achieve rates of return of more than 39 percent.[10] The Bureau denied all petitions to reject the revised HiCap and DDS rates and denied petitions to suspend rates that were targeted to achieve returns of less than 34 percent.

6. Ad Hoc asserts that the Bureau erred in allowing HiCap and DDS rates to become effective that were targeted to generate rates of return significantly above the rate of return ceiling for the special access category as a whole. It argues that this Commission has not established a range or zone of ratemaking flexibility for strategically-set rates and, therefore, that the Bureau exceeded its delegated authority by essentially defining a permissible zone of ratemaking flexibility. Ad Hoc asserts that until this Commission rules on the legality of strategic pricing and establishes guidelines for the evaluation of such rates, the Bureau lacks authority to permit rates outside the traditional zone of reasonableness to become effective. Ad Hoc Application at 13. Ad Hoc concludes that the Bureau should have suspended all HiCap and DDS rates proposed by the LECs that would generate returns of 18 percent or more (50 percent above the rate of return ceiling for the special access category as a whole) and should have required the affected carriers to reduce the rates to "lawful" levels.[11]

7. Oppositions to Ad Hoc's application were filed by the Ameritech Operating Companies (Ameritech), the Bell Atlantic Telephone Companies (Bell Atlantic), the BellSouth Telephone Companies (BellSouth), the NYNEX Telephone Companies (NYNEX), Pacific Bell and Southwestern Bell Telephone Company (Southwestern). Those carriers state that this Commission's Part 69 rules have never required that the LECs target each individual special access service (sub-category or rate element) at the authorized rate of return: the rate of return requirement applies only to the special access category as a whole.[12] The LECs unanimously disagree with Ad Hoc's assertion that the Bureau exceeded its delegated authority, arguing

instead that the Bureau's decision to suspend only the most excessive rates was a reasonable balancing of this Commission's traditional cost-based ratemaking principles and Commission policy regarding strategic pricing pending the completion of the *Docket 85 -166* investigation.[13] The LECs conclude that the Bureau's response to petitions to suspend was within its delegated authority and did not present a novel question of fact or Commission policy.

2. *Discussion*

8. Ad Hoc's application for review raises many of the same concerns it advanced in support of its petition to reject or suspend the pending tariffs.[14] As the Bureau correctly determined, the issue before it in considering petitions to suspend the annual 1987 access tariff filings was not the legality of strategic pricing *per se*. *December 31 Order*, 2 FCC Rcd at 283. That issue will be determined in our pending investigation in *Docket 85 -166*. Thus, to the extent Ad Hoc seeks review of the decision to deny its petition to reject by repeating its arguments regarding the lawfulness of strategic pricing of certain special access services, we affirm the Bureau's decision because we have already determined that existing rules and precedents do not provide a basis for summary rejection of rates that reflect strategic pricing.

9. The essence of Ad Hoc's challenge to the *December 31 Order* is that the Bureau exceeded its delegated authority. It states that the Bureau is not authorized to act on behalf of this Commission in making major policy decisions.[15] It states further that this Commission has never endorsed strategic pricing or established an acceptable range of strategic rate markups and that, therefore, the Bureau's suspension of some strategic rates while allowing others to become effective was an improper exercise of policymaking authority.

10. We disagree with Ad Hoc's characterization of the Bureau's action. A decision to suspend or refrain from suspending particular rates that will be subject to an investigation does not establish any long term policy with respect to any category of rates and does not foreclose any remedial action that may be appropriate[16] if we ultimately determine that some or all of the unsuspended rates were unlawful.[17] The Common Carier Bureau routinely acts upon petitions to suspend particular tariff filings by granting or denying such petitions in whole or in part. The authority that has been delegated pursuant to Section 0.91 of our rules is clearly broad enough to include that function.

11. Ad Hoc has not demonstrated that the Bureau's decision to suspend some increases and to refrain from suspending others is inconsistent with any guidance that we have provided in the past. At most, Ad Hoc seems to be urging us to establish a new suspension standard for future guidance. We are not persuaded by Ad Hoc's argument that the Bureau should have suspended all rate increases that would have achieved returns of more than 18 percent. There is no record evidence to support an 18 percent cap on strategic rate levels. Ad Hoc has failed to advance any persuasive argument for using its approach as a substitute for the action taken by the Bureau. The fact that the Bureau did not choose the rate level for suspension favored by Ad Hoc does not indicate that its actions in the *December 31 Order* were not reasonable or that they were inconsistent with established standards or policies.

B. *Non -Recurring Charges*

1. *Pleadings*

12. Ad Hoc also seeks reconsideration of the Bureau's decision to deny petitions to reject or suspend revised non-recurring charges (NRCs) for both switched and special access services.[18] It states that Commission policy requires that revised NRCs be supported by actual data and that the LECs provided only estimates of non-recurring costs in developing their revised NRCs.[19] Ad Hoc submits that the Bureau erred in allowing proposed NRCs supported only by estimates of associated time and costs to become effective and urges us to take appropriate action. Ad Hoc Application at 17-18.

13. The LECs oppose Ad Hoc's contention that revisions to NRCs must be supported by "actual" data. BellSouth states that Section 61.38 of this Commission's Rules, 47 C.F.R. § 61.38, clearly contemplates that a carrier's proposed rates be supported by *estimates* of relevant costs. BellSouth Opposition at 10-11. BellSouth also states that our request for actual data as part of the NRC investigation in *Docket 85 -166* did not require actual data in support of NRC revisions in future access tariff filings. Bell Atlantic states that the costs it reported for non-recurring activities in its 1987 access tariff filings were based on careful studies of the time required to perform non-recurring tasks and are "actual" costs in the sense that they are based on actual studies of the actual tasks performed multiplied by actual labor costs. Bell Atlantic Opposition at 5. Bell Atlantic also states that no better information is available and that the LECs do not separately track the costs associated with non-recurring activities.

2. *Discussion*

14. On June 11, 1987, we released an Order completing our investigation of NRCs for both switched and special access services.[20] In the *NRC Order*, we examined the cost estimate methodologies used by most of the LECs in support of the NRCs under investigation. We concluded that this information was consistent with our expectations. *NRC Order*, 2 FCC Rcd at 3500, 3501. In the absence of a regulatory framework for more specifically tracking these costs, we found it appropriate to allow the LECs some latitude in developing methods to track non-recurring costs.

15. Given our recent decision in the NRC investigation, we affirm the Bureau's decision to deny petitions to reject or suspend most of the proposed NRCs. The Bureau found that most of the LECs provided estimates of the time needed to perform the relevant installation and disconnection services and generally provided reasonable explanations for their assumptions, methodologies and estimates. *December 31 Order*, 2 FCC Rcd at 282. The Bureau further found that this was the proper approach to take as an interim measure prior to completion of our investigation of non-recurring charges in *Docket 85 - 166*. We have now completed that investigation and have found such data adequate to support revised NRCs. Accordingly, we affirm the Bureau's action.[21]

III. WESTERN UNION APPLICATION FOR REVIEW

A. *Pleadings*

16. In its petition against the 1987 access tariffs, Western Union alleged that special access rates are overstated in many states because the LECs have overallocated costs to the special access category, particularly Outside Plant and Circuit Central Office Equipment, resulting in inflated special access revenue requirements and inflated rates.[22] It argued that the Bureau should institute an investigation of the separations and cost allocation procedures underlying the 1987 access tariff filings. In the *December 31 Order*, the Bureau concluded that an investigation of separations methodologies was not warranted at that time. It also stated that this Commission had taken the first steps to carry out a study of demand reconciliation methodology, which would be useful in resolving the separations and ratemaking demand reconciliation questions that underlie much of Western Union's arguments. *December 31 Order*, 2 FCC Rcd at 286.[23]

17. Western Union seeks review of the *December 31 Order* insofar as the Bureau declined to institute an investigation of the separations and cost allocation procedures underlying the annual 1987 access tariffs. Western Union alleges that the LECs' procedures for separating total company costs between jurisdictions and among types of service are producing overallocations to the interstate jurisdiction and to the special access category and should be investigated. It cites the separations algorithms voluntarily provided by BellSouth and Southwestern Bell in their tariff support as evidence of such cost overallocations resulting in overstated special access revenue requirements. Western Union Application at 5. It further argues that the demand reconciliation study will provide "virtually no useful information in resolving the separations and cost allocations issues identified by Western Union." *Id.* at 9.[24]

18. The LECs oppose the Western Union application. Ameritech argues that the Bureau received extensive cost support information from the various LECs and took a number of actions to suspend, investigate and reduce proposed rates as a result of its analysis of the extensive record in this proceeding. Ameritech Opposition at 3. It states that the Bureau's decision not to initiate an investigation cannot be considered erroneous or an abuse of discretion. *Id.* at 4. Ameritech also argues that, contrary to Western Union's allegations, the LECs' separations and cost allocation procedures have been the subject of continual investigation by this Commission and no evidence of violations of Part 67 or Part 69 of our Rules have been identified. *Id.* at 6. NYNEX contends that Western Union's apparent identification of errors in the separations procedures of BellSouth and Southwestern Bell does not establish that the entire allocation process is suspect. NYNEX Opposition at 6. It observes that the NYNEX companies do not use the ESAS (Enhanced Separations Analysis System) used by BellSouth and Southwestern Bell for their jurisdictional separations, but that they rely instead on adjusted historical separations results.[25] In short, NYNEX contends that Western Union has failed to establish that an industry-wide investigation is warranted.

B. *Discussion*

19. We deny Western Union's application for review. As the *December 31 Order* indicates, the Bureau reviewed volumes of support material in considering the LECs' revised special access tariffs. It is within our discretion (or that of the Bureau, acting under delegated authority) to determine how much information is required in order to determine whether rejection, suspension or investigation of a proposed tariff is warranted. Such supporting information is for this Commission's benefit in performing our statutory review responsibilities. The fact that a commenter may believe that the submission of additional data is necessary does not require us to commence a tariff investigation if we believe that we have amassed sufficient information to perform our responsibilities.[26] It is important to remember that the Communications Act provides specific procedures for processing carrier-initiated rate revisions. These procedures represent a careful accommodation of competing interests; *i. e.*, that rates be just, reasonable and non-discriminatory, as well as concern that unduly delayed action on tariff revisions could economically damage a carrier.[27] The Act authorizes this Commission to establish reasonable procedures to perform our tariff review responsibilities,[28] and we have substantial discretion to structure the tariff review process to assure that our responsibilities are met within the applicable period.

20. Moreover, a Section 204 tariff investigation is merely one of the tools that we can use to ensure that carriers are complying with the accounting and cost allocation rules that produce the data that is used in rate computations. We engage in a variety of auditing and monitoring activities on a continuing basis and sometimes require carriers to perform special studies. We have recently required such a study to identify and rectify possible discrepancies in special access data.[29] We believe that approach is likely to be more effective than a Section 204 investigation and do not share Western Union's skepticism about the methods we have chosen to perform tasks that are committed to our discretion. If, however, the tools we have chosen do not produce satisfactory results, we will have many opportunities to initiate a Section 204 investigation to examine LEC separations in the future. If Western Union believes that existing rates are excessive, it may, of course, invoke Section 208 procedures that place the primary burden upon the complainant to identify and demonstrate carrier errors in the computation of rates.

21. We conclude here that absent more convincing evidence of gross misallocations resulting in unreasonable rates, the Bureau decision to refrain from initiating a Section 204 investigation to examine separations computations underlying the 1987 special access rates should be affirmed. Western Union's analysis of the information provided by BellSouth and Southwestern Bell does not prove that an industry-wide investigation is warranted, particularly when most of the other LECs use a different system for their separations methodology and cost allocations. Western Union has not demonstrated that the potential additional increment of rate reliability that might result from its proposed investigation is warranted, particularly in light of the costs, complexities and resources required. Thus, we affirm the Bureau's decision to deny Western Union's request for an investigation of the separations and cost allocation methodologies underlying the 1987 special access tariff filings.[30]

IV. ORDERING CLAUSE

22. Accordingly, IT IS ORDERED, that the petition for clarification and/or application for review of the *December 31 Order* filed by the Ad Hoc Telecommunications Users' Committee and the application for review of the *December 31* Order filed by the Western Union Telegraph Company ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Annual 1987 Access Tariff Filings, Mimeo No. 1322, 2 FCC Rcd 280 (1986) (*December 31 Order*).

[2] On December 24, 1986, the Bureau issued an Order primarily considering the rates for switched access services. *See* Annual 1987 Access Tariff Filings, Mimeo No. 1251, 2 FCC Rcd 866 (1986).

[3] For a listing of the specific actions taken, see the *December 31 Order*, 2 FCC Rcd at 280.

[4] Petition for Clarification and/or Application for Review of the Ad Hoc Telecommunications Users' Committee, filed Jan. 30, 1987 (Ad Hoc Application); Application for Review of the Western Union Telegraph Company, filed Jan. 30, 1987 (Western Union Application).

[5] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166 (*Docket 85 -166)*, Mimeo No. 4726, released May 24, 1985.

[6] *See* Annual 1985 Access Tariff Filings, Mimeo No. 7401, released Sept. 30, 1985 (*September 30 Order)*.

[7] Annual 1985 Access Tariff Filings, FCC 86-379, released Sept. 2, 1986 (*Access Tariff Review Order)*.

[8] *Id.*, at para. 8.

[9] These return levels were calculated based on disaggregated data for the nine principal special access categories using a fully distributed cost (FDC) methodology. *See* Commission News Release, "Common Carrier Bureau Requests Local Exchange Carrier Special Access Data," Report No. CC-131, released Aug. 5, 1986.

[10] The Bureau suspended New York Telephone's proposed rates for DDS service, BellSouth's rates for HiCap in Mississippi, Mountain Bell's rates for HiCap in Idaho, Utah and New Mexico, Illinois Bell's rates for HiCap and DDS and Michigan Bell's rates for HiCap service.

[11] Ad Hoc Application at 16. Ad Hoc also asks this Commission to prescribe just and reasonable rates, under Section 205 of the Communications Act, for the HiCap and DDS offerings of those carriers, such as New York Telephone, that maintained existing rate levels or even reduced them, but that are still targeted to achieve excessive rates of return.

[12] For example, BellSouth notes that this Commission has never determined that a rate of return analysis by subelement is the appropriate basis for determining the reasonableness of rates for special access subelements. Opposition of BellSouth at 8.

[13] Bell Atlantic observes that the service-by-service rate of return data may lack uniformity and consistency from carrier to carrier. Accordingly, Bell Atlantic states that it would have been inappropriate for the Bureau to do other than what it did; *i. e.*, to use the data as a general guide with only extreme variations singled out for action. Opposition of Bell Atlantic at 3.

[14] In the Matter of Annual 1987 Access Tariff Filings, Petition of the Ad Hoc Telecommunications User's Committee for Partial Rejection, Suspension and/or Investigation, Oct. 28, 1986.

[15] Ad Hoc Application at 11, citing 47 C.F.R. § 0.5(c). A more specific listing of the functions of the Common Carrier Bureau is contained in 47 C.F.R. § 0.91 which states, in pertinent part, that the Bureau acts for this Commission under delegated authority in matters pertaining to "determinations regarding [the] lawfulness of carrier tariffs . . . ."

[16] We note that the Bureau incorporated all of the proposed strategic rates into the pending investigation in Docket 85-166 and extended the accounting order in that proceeding to apply to the rates that were allowed to become effective. *December 31 Order* at para. 32.

[17] The Bureau subsequently determined that the suspended rates were unlawful and must be withdrawn. *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 2 FCC Rcd 3507 (1987) (*May 29 Order).* The legality of the unsuspended rates is still an open question which will be addressed in a subsequent order in CC Docket No. 85-166.

[18] The Bureau suspended the proposed NRC rate increases of Northwestern Bell and Mountain Bell because neither carrier provided sufficient supporting data for their proposed rates. It also suspended the new and revised NRCs for C-conditioning proposed by Pacific Bell, Pacific Northwest Bell, Southern Bell and South Central Bell. The other proposed NRCs became effective. *December 31 Order* at para. 20.

[19] In support of this contention, Ad Hoc cites prior Orders which established the investigation of non-recurring charges in CC Docket No. 85-166 and required the submission of "actual" non-recurringcosts for the period April 1 through September 30, 1985. *See Docket 85 - 166*, Mimeo No. 4726, released May 24, 1985 (*May 24 Order)* ; *Docket 85 -166*, FCC 86-52, released Jan. 24, 1986 (*January 24 Order), aff' d on review*, FCC 86-466, 1 FCC Rcd 427 (1986).

[20] Investigation of Interstate Access Tariff Non-Recurring Charges, CC Docket No. 85-166, Phase I, Part 3, 2 FCC Rcd 3498 (1987) (*NRC Order).*

[21] Ad Hoc also seeks clarification of the scope of the NRC investigation. It states that the language of the *December 31 Order* portended a more limited investigation of NRCs than was established by the *May 24 Designation Order*. In the *NRC* Order, we fully addressed all of the issues designated for investigation in that proceeding. Accordingly, this request for clarification is moot.

[22] Annual 1987 Access Tariff Filings, Petition of the Western Union Telegraph Company for Rejection and/or Suspension and Investigation, Oct. 28, 1986.

[23] We subsequently initiated our demand reconciliation study. See Request for Information Concerning Local Exchange Carrier Special Access Demand Quantities, 2 FCC Rcd 3236 (1987).

[24] Specifically, Western Union asks this Commission to initiate an investigation and require each carrier to submit the Part 67 algorithms employed in developing its revenue requirements for the 1987 access tariffs, along with underlying studies of major outside plant and central office circuit equipment allocations. It would also require a reconciliation of the loops and trunk miles underlying each carrier's projected revenue requirements with forecast channel terminations and channel mileage demand.

[25] NYNEX states that its historical separations results were obtained from the Separations Information System (SIS) which has passed the scrutiny of internal and external auditors as well as this Commission. NYNEX Opposition at 7.

[26] See, e.g., Aeronautical Radio, Inc. v. FCC, 642 F.2d 1221, 1235 (1980).

[27] See Pacific Northwest Bell Telephone Company, FCC Rcd 2407, 2408 (1987).

[28] See American Telephone and Telegraph Company, 86 FCC 2d 956, 960 n.12 (1981).

[29] Request for Information Concerning Local Exchange Carrier Special Access Demand Quantities, 2 FCC Rcd 3236 (1987)

[30] Although the demand reconciliation study we have required will not affect the 1987 access tariff filings, it will be useful in assessing the LECs' methodologies in their 1989 access tariff filings.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

VACATIONLAND BROADCASTING COMPANY, INC. (WFTW-FM) Ft. Walton Beach, Florida	**BC DOCKET NO. 81-855** File No. BPH-790518AA
For Construction Permit to Make Major Changes in the Facilities of Station WFTW-FM	
MIRACLE STRIP COMMUNICATIONS, INC. Ft. Walton Beach, Florida	**BC DOCKET NO. 81-856** File No. BPH-790509AA
JUANINA, INC. OF FORT WALTON BEACH Ft. Walton Beach, Florida	**BC DOCKET NO. 81-858** File No. BPH-791114AD
PINNACLE BROADCASTING CORPORATION Ft. Walton Beach, Florida	**BC DOCKET NO. 81-859** File No. BPH-791115AB
DA-GON BROADCASTING, INC. Ft. Walton Beach, Florida	**BC DOCKET NO. 81-869** File No. BPH-791115AB File No. BPH-791115AI
For Construction Permit for a New FM Station	

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1988; Released: February 18, 1988

By the Commission:

1. This proceeding involves five mutually exclusive applications for FM Channel 243C in Ft. Walton Beach, Florida. Vacationland Broadcasting Company is the licensee of station WFTW- FM in Ft. Walton Beach, which is licensed to operate on FM Channel 257A. The Commission granted Vacationland's application to modify the license for station WFTW-FM to operate on FM Channel 243C, and denied competing applications for authority to construct a new FM station on FM Channel 243C filed by Juanina Inc. of Ft. Walton Beach, Miracle Strip Communications, Inc., Pinnacle Broadcasting Corporation, and Da-Gon Broadcasting, Inc. *Vacationland Broadcasting Co.*, 97 FCC 2d 485 (Rev. Bd. 1984), modified, 58 RR 2d 439 (1985). The four losing applicants sought judicial review of the Commission's decision granting Vacationland's application.

2. By its Order of December 23, 1985, the United States Court of Appeals for the District of Columbia Circuit, acting at the Commission's request, remanded the proceeding in *Pinnacle Broadcasting Corp. v. FCC*, No. 85-1364, to the Commission so that it could reevaluate the diversification criterion. The Commission reaffirmed its original determination to prefer Vacationland over the four applicants for a new FM station under the standard comparative issue. *Vacationland Broadcasting Co.*, 103 FCC 2d 1191 (1986).

3. Pinnacle filed a petition for reconsideration of the Commission's Order reaffirming the grant of Vacationland's application.[1] In addition, Juanina filed a contingent petition to enlarge issues against Vacationland on September 5, 1986.[2] Both pleadings challenged the ability of Vacationland's owner, Wilbur Powell, to effectuate his full-time integration proposal. [3] In a letter dated October 6, 1986 and a petition for leave to amend filed November 3, 1987, Vacationland reported the death of Wilbur Powell on October 4, 1986 and sought to amend its integration proposal.

4. Before Mr. Powell's death, Vacationland filed a petition for Rule Making requesting that FM channel 258C2 be substituted for channel 257A, which Vacationland currently occupies. On August 4, 1987, the Chief of the Mass Media Bureau, acting under delegated authority, granted the petition for Rule Making and, effective October 13, 1987, modified Vacationland's license for station WFTW-FM to specify operation on channel 258C2. *Report and Order*, 2 FCC Rcd 5234 (1987). In doing so the Bureau indicated that "[a]s a result of this action, Vacationland's interest in channel 243C has been eliminated . . . . [and] the existing applicants may now prosecute their filings for a new station." 2 FCC Rcd at 5234 ¶ 7.

5. In view of the Bureau's action, Juanina filed a request for expedited action on September 16, 1987. It urged the Commission to seek a further remand from the court so that we may expeditiously resolve the remaining issues in this adjudicatory proceeding. Comments filed September 24, 1987 by Pinnacle support Juanina's request for expedited action. Subsequently, on October 14, 1987, Vacationland filed a pleading requesting that the Commission dismiss with prejudice its application for FM channel 243C, which is at issue in this adjudicatory proceeding.

6. We will dismiss Vacationland's application with prejudice, grant Juanina's request for expedited action, and dismiss as moot the remaining pleadings. In this regard, Pinnacle's petition for reconsideration and Juanina's contingent petition to enlarge issues relate only to Vacationland's application for FM channel 243C. In view of the voluntary withdrawal of Vacationland's application to modify its license for station WFTW-FM, there is no need to explore the matters raised in these pleadings any further. See *Allegan County Broadcasters, Inc.*, 83 FCC 2d 371, 373-74 (1980) (public interest held not to require resolution of character allegations against a withdrawing applicant because these matters may be explored in a future Commission proceeding involving the dismissing applicant).

7. Our action herein comports fully with 47 C.F.R. § 73.3518, by which we prohibit the filing of inconsistent applications. In this regard, FM licensees seeking to modify their licenses to specify operation on an adjacent chan-

nel or higher class co-channel are not required to file formal applications. *FM License Upgrading*, 60 RR 2d 114 (1986). Furthermore, we have never determined that a petition for Rule Making constitutes an "application" for purposes of section 73.3518.

8. With Vacationland's withdrawal from this proceeding, we face the task of determining which remaining applicant will best serve the public interest. Because the court remanded this proceeding for the limited purpose of permitting us to reconsider the diversification criterion, a further remand is necessary before we may address this question and make a grant to the comparatively superior applicant. Thus, we instruct the General Counsel to promptly seek a further remand from court so that we may consider this question and expeditiously terminate this lengthy adjudicatory proceeding.

9. ACCORDINGLY, IT IS ORDERED, That the Request for Dismissal of Application, filed October 14, 1987 by Vacationland Broadcasting Co., and the Request for Expedited Action, filed September 16, 1987 by Juanina, Inc. of Ft. Walton Beach, ARE GRANTED; that the application of Vacationland Broadcasting Co. (File No. BPH-790518AA) IS DISMISSED with prejudice; and that the Petition for Leave to Amend, filed November 3, 1986 by Vacationland Broadcasting Co. IS DISMISSED as moot.

10. IT IS FURTHER ORDERED, That the following pleadings ARE DISMISSED as moot: (a) Petition for Reconsideration, filed May 29, 1986 by Pinnacle Broadcasting Corp.; (b) Contingent Petition to Enlarge Issues, filed September 5, 1986 by Juanina, Inc. of Ft. Walton Beach; and (c) Motion to Strike, filed June 19, 1986 by Vacationland.

11. IT IS FURTHER ORDERED, That the General Counsel IS INSTRUCTED to file a motion requesting that the United States Court of Appeals remand the proceeding in *Pinnacle Broadcasting Corp. v. FCC*, No. 85-1364 (D.C. Cir. filed June 17, 1985) to the Commission for further evaluation of the applicants' comparative qualifications.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Juanina filed comments supporting Pinnacle's petition for reconsideration on June 12, and a supplement thereto on June 16, 1986. Vacationland filed an opposition on June 11, 1986, and Pinnacle filed a reply on June 23, 1986. Vacationland filed a motion to strike Juanina's comments on June 19, 1986, which Juanina opposed on June 23, 1986.

[2] Vacationland filed an opposition to the contingent petition to enlarge issues on September 25, 1986, and Juanina filed a reply to opposition on October 3, 1986.

[3] Pursuant to an Order, FCC 86I-81 (released July 1, 1986), requesting further information as to Mr. Powell's physical condition, Vacationland filed comments on July 18, the notarized statement of Roger D. Riggenbach on July 23, and a letter on August 27, 1986. In response, Juanina filed reply comments on July 25, and an erratum thereto, on July 28, 1986. In addition, Pinnacle filed reply comments on July 25, 1986. Juanina filed further comments on September 5, 1986.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-297

In the Matter of

Amendment of Section 73.202(b), RM-5868
Table of Allotments,
FM Broadcast Stations.
(Franklin, Pennsylvania)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 26, 1988; Released: February 18, 1988

By the Chief, Allocations Branch:

1. At the request of Northwestern Pennsylvania Broadcasting Co., Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 4712 (1987), proposing the substitution of Channel 257B1 for Channel 257A at Franklin, Pennsylvania, and the modification of its license for Station WVEN(FM) to specify the higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allocated. No other comments were received.

2. At the request of the petitioner, the Commission proposed that a 7.5 kilometer (4.7 mile) west site restriction be imposed on the allotment so as to accommodate Federal Aviation Administration (FAA) concerns and allow compliance with the Commission's minimum distance separation requirements to all domestic allotments. In proposing the allotment with the requested site restriction, the Commission noted that use of this site would create a 14.8 kilometer short-spacing to Station CJBC-4, Channel 257B at London, Ontario, but that all of the interference would fall over Lake Erie. However, since the U.S.-Canadian Working Agreement specifically exempts the Great Lakes from interference protection, we sought concurrence from the Canadian Government in the allocation of Channel 257B1 to Franklin as a "specially negotiated short- spaced allotment."[1] Canadian concurrence in the allotment has been received.

3. We believe the public interest would be served by substituting Channel 257B1 for Channel 257A since it could enable Station WVEN(FM) to provide improved service to Franklin and its environs. As proposed, we shall also modify the license of Station WVEN(FM) to specify operation on the higher powered channel. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 4, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Franklin, Pennsylvania	257B1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Northwestern Pennsylvania Broadcasting Co., Inc. for Station WVEN(FM), Franklin, Pennsylvania, IS MODIFIED effective **April 4, 1988,** to specify operation on Channel 257B1, in lieu of Channel 257A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for this allotment are: North Latitude 41o, 25', 00"; West Longitude 79o, 55', 00".

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Harriscope of Chicago, Inc., *et.al* a Joint Venture d/b/a VIDEO 44 — **MM Docket No. 83-575** File No. BRCT-820802J9

For Renewal of License of Station WSNS-TV, Channel 44 Chicago, Illinois

and

MONROE COMMUNICATIONS CORPORATION Chicago, Illinois — **MM DOCKET NO. 83-576** File No. BPCT-821101KH

For a Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: January 12, 1988; Released: January 22, 1988

By the Commission: Commissioner Dennis concurring and issuing a statement.

1. Before the Commission are: (1) a Petition for Reconsideration and a Motion for Leave to File Petition for Reconsideration filed May 19, 1986 by Monroe Communications Corporation; (2) Oppositions filed May 29, 1986 by Video 44 and the Mass Media Bureau; (3) a Supplement to Petition for Reconsideration of Monroe Communications Corporation filed July 31, 1986; (4) Oppositions filed August 11, 1986 by the Bureau and August 15, 1986 by Video; (5) a Second Supplement to Petition for Reconsideration of Monroe Communications Corporation and a Motion of Monroe Communications Corporation for Leave to File Second Supplement to Petition for Reconsideration filed October 10, 1986; (6) Oppositions filed October 22, 1986 by Video and the Bureau and a Reply filed November 3, 1986 by Monroe; (7) a Motion for Consolidation and Certification filed October 7, 1986 by Monroe; (8) Oppositions filed October 20, 1986 by Video and the Bureau and a Reply filed October 30, 1986 by Monroe; and (9) a Motion to Strike (Monroe's Reply) filed November 3, 1986 by Video.

2. These pleadings relate to a memorandum opinion and order of the Commission deleting an obscenity issue in this proceeding. *Video 44*, 103 FCC 2d 1204 (1986).

I. BACKGROUND

3. In this comparative renewal proceeding, Video 44 seeks renewal of its license to operate station WSNS-TV in Chicago, Illinois. WSNS-TV commenced operation in 1970. At the beginning of the 1979-82 license term, at issue here,[1] it was a conventional commercial UHF television station. In 1980, the station began subscription television (STV) operation, which by 1982 comprised virtually its entire schedule. The station resumed conventional operation as a Spanish language station in 1985.

4. Monroe Communications Corporation has filed a mutually exclusive application for a construction permit. Administrative Law Judge Joseph Chachkin denied Video's application and granted Monroe's on comparative grounds. *Video 44*, 102 FCC 2d 419 (I.D. 1985). He held that Video was not entitled to a renewal expectancy based on its past programming record and that Monroe enjoyed decisive advantages over Video for integration of ownership into management and for diversification of media control.

5. On appeal, the Review Board found that the record contained prima facie evidence that adult oriented programming carried on WSNS-TV between April 1981 and October 1982 was obscene and violated 18 U.S.C. § 1464, which states:

> Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both.

The programming at issue consisted of movies shown late at night during STV operation. Thus, viewers were required to make an affirmative decision to purchase the programming in question and had to obtain a special decoding device to unscramble the STV signal.[2] In particular, the Board relied on Monroe's Exhibit 8, a description of the film *Pandora's Mirror*, which indicated that virtually the entire film is devoted to sexual acts and related activities. The Board also noted that other movies shown on the station were devoted to a similarly explicit treatment of sexual themes. Hence, the Board added an issue as to whether Video violated section 1464 by carrying obscene programming and, if so, what the impact of such programming should be on Video's qualifications. The Board remanded the proceeding to the ALJ for further hearings. *Video 44*, 102 FCC 2d 408 (Rev. Bd. 1985).

6. The Board also certified a separate question to the Commission, seeking guidance on the appropriate renewal expectancy standard for STV operation. In considering that question, the Commission also decided on its own motion to review the Board's order adding the obscenity issue, because of its important First Amendment implications. *Video 44*, 103 FCC 2d 1204 (1986). With respect to the obscenity issue, the Commission acknowledged that in the past its policy was to enforce section 1464 by applying administrative sanctions where a showing had been made that programming was obscene. However, the Commission found it appropriate to modify its policy in this regard. The Commission held that, because questions of obscenity involve a determination of local community standards, the Commission would not consider such questions in the first instance. 103 FCC 2d at 1210-11. Rather, the Commission stated that it would act only if a licensee had been convicted under section 1464. *Id.* The Commission believed that such an approach would protect its processes from unproductive litigation and give appropriate deference to the expertise of prosecutors to recognize situations in which legal action was appropriate. *Id.* Accordingly, the Commission deleted the obscenity issue in this case.

II. PLEADINGS

7. Monroe seeks reconsideration of the Commission's action deleting the obscenity issue. Initially, Monroe filed a petition for reconsideration that argues that the Commission should not have changed its policy with respect to section 1464 in this proceeding and instead should have initiated a rule making. Monroe also challenged the reasoning which the Commission employed in supporting its policy change. Monroe denies that local authorities could better determine local community standards than the Commission and that deferring to local authorities will protect the Commission's processes from frivolous charges. Monroe sought leave to file this pleading because the Commission's rules generally prohibit reconsideration of interlocutory actions, such as the deletion of issues. 47 C.F.R. § 1.106(a)(1).

8. Later, Monroe filed a supplement to its petition noting that, on July 9, 1986, the Attorney General's Commission on Pornography issued its *Final Report*. Monroe urges that the *Final Report* reaches conclusions inconsistent with the policy previously announced by the Commission in this proceeding. According to Monroe, the *Final Report* specifically recommends that the Commission actively enforce relevant anti-obscenity laws, including section 1464. Video responds that the Commission's policy of deferring to local prosecutors can be reconciled with the *Final Report*. Video contends that the Commission's policy is soundly reasoned and that the recommendations of the *Final Report* place primary emphasis on enforcement at the federal level on the Department of Justice and on the United States Attorneys rather than the Commission. Video also maintains that the *Final Report* does not reject the concept of a limited role for the Commission in enforcing anti-obscenity laws. In any event, Video submits that the Commission is not bound by the *Final Report*.

9. In a second supplement to its petition, Monroe noted that the Commission recently undertook to enforce section 1464 more actively in three cases where licensees broadcast allegedly indecent programming. *Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd 2705 (1987); *The Regents of the University of California*, 2 FCC Rcd 2703 (1987); *Pacifica Foundation, Inc.*, 2 FCC Rcd 2698 (1987); order on reconsideration, *Infinity Broadcasting Corp. of Pa.*, FCC 87-365 (adopted Nov. 24, 1987; released Dec. 29, 1987). Monroe contends that the Commission's decision to prosecute cases of allegedly indecent programming implies that the Commission should also actively prosecute cases of obscenity. Video responds that the reasons underlying a policy of restraint with respect to obscenity are inapplicable to indecency, and that, therefore, there is no inconsistency in Commission enforcement policy.

III. DISCUSSION

10. For the same reasons that we initially reviewed the Board's interlocutory order on our own motion -- i.e., the important First Amendment ramifications of the issues before us -- we waive section 1.106(a)(1) of our rules and consider Monroe's petition. We now reconsider and reverse our earlier decision to the extent indicated herein.

11. Although it may be preferable, in most cases, to deal with questions of obscenity in the context of a previously adjudicated prosecution in a local judicial district, we are persuaded, on reflection, that we should retain the ability to pursue a range of options when allegations of a violation of section 1464 are raised against a licensee. Those options include not only referring complaints against licensees to the U.S. Department of Justice for a possible criminal prosecution for obscenity under section 1464, *e.g.*, *Pacifica Foundation, Inc.*, 2 FCC Rcd at 2701 6 26, but also undertaking our own action and exercising one of the many administrative sanctions available to us. E.g., 47 U.S.C. §§ 303(m) (suspension of license), 312(a) (revocation of license), 312(b) (cease and desist order) & 503(b) (forfeiture). To the extent, therefore, that our previous order in this proceeding suggested that we would never undertake our own administrative determination of an obscenity issue in the first instance, we now reverse that conclusion.

12. In our previous order, we concluded that obscenity determinations require the application of local community standards and that, consequently, the Commission was precluded from making those determinations in the first instance. *Video 44*, 103 FCC 2d at 1210-11. Under *Miller v. California*, 413 U.S. 15 (1973), a work is obscene if (a) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (b) the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable law; [3] and (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. 413 U.S. at 24. Two of the three criteria for obscenity -- whether a work appeals to the prurient interest and whether it is patently offensive -- are to be judged according to contemporary community standards. E.g., *Smith v. United States*, 431 U.S. 291, 300-01 (1977). The third criterion -- whether the work lacks serious value -- is to be judged according to a reasonable person test. *Pope v. Illinois*, 107 S.Ct. 1918 (1987).

13. In *Miller*, the Supreme Court stated that its primary purpose in referring to contemporary community standards was to permit triers of fact to exercise their traditional function of making judgments based on their knowledge of the views of the average person in the community. 413 U.S. at 30. In *Hamling v. United States*, 418 U.S. 87, 104-05 (1974), the Court also noted that, by referring to contemporary community standards in *Miller*, it did not intend to require, as a constitutional matter, the use of any precise geographic area in evaluating whether material satisfied the obscenity criteria. Rather, the Court stated that: "a principal concern in requiring that a judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." *Id.* at 107. *See* also *Miller v. California*, 413 U.S. at 33; *Smith v. United States*, 431 U.S. at 305.

14. We recognize that, in the application of the obscenity standard in the context of, for example, the enforcement of 18 U.S.C. § 1461 (prohibiting the mailing of obscene material), lower courts have focused on the local nature of the contemporary community standards criterion and the value of local decisionmakers in the application of that criterion. *See* generally *United States v. Various Articles of Obscene Merchandise, Seizure No. 170*, 750 F.2d 596 (7th Cir. 1984); *United States v. Bagnell*, 679 F.2d 826 (11th Cir. 1982), cert. denied, 460 U.S. 1047 (1983); *United States v. Thomas*, 613 F.2d 787 (10th Cir.), cert. denied, 449 U.S. 888 (1980); *United States v. McManus*, 535 F.2d 460 (8th Cir. 1976), cert. denied 429 U.S. 1052 (1977). That focus, however, has developed in the context of a judicial system capable of using local decisionmakers in

criminal prosecutions of obscenity. Our review suggests that these cases may be inapplicable in the context, as here, of an administrative action by a national agency. We do not believe, therefore, that they necessarily preclude us from undertaking obscenity determinations in the first instance. Indeed, we note that, in the past, the Commission undertook an obscenity determination without focusing on a particular community and was upheld by the Court of Appeals. *Sonderling Broadcasting Corp.*, 27 RR 2d 285, recon. denied, 41 FCC 2d 777 (1973), aff'd sub nom. *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (D.C. Cir. 1975). Hence, we believe that we may, as a constitutional matter, apply a broader contemporary community standard for broadcasting generally in obscenity cases. We do not -- and need not -- decide here whether, as a policy matter, we might choose to attempt to approximate a more local community standard in an appropriate case presenting an obscenity issue.[4]

15. Despite our decision to reconsider and reverse our previous order regarding our ability to consider allegations of obscenity in the first instance, we nevertheless believe that we must sustain the deletion of the obscenity issue against Video in this case. It has been the practice of this agency to consider such allegations for the first time in the context of prima facie complaints filed contemporaneously with the broadcasts at issue. And because of the sensitive First Amendment issues involved, we believe that the public interest requires us to maintain this practice. Therefore, for the reasons discussed below, we conclude that considering such allegations for the first time in the context of this renewal proceeding would affirmatively disserve the public interest.

16. Allegations that a licensee has broadcast obscene material should be presented to the Commission at the time of the broadcast or soon thereafter. Considering allegations at that time will allow the Commission to take action that will remedy in a timely manner any violation that may be occurring. If no complaints are received until the end of the license term, then, the licensee may well continue to air materials that violate the law. On the other hand, if complaints are brought contemporaneously, any adverse action by the Commission will put the licensee on notice that its conduct is unacceptable.

17. Equally important, considering such allegations at renewal time may have a chilling effect on a broadcaster's disposition to air protected speech. A licensee might be discouraged from presenting controversial material if it faced the possibility of losing its license years after presenting the programming without notice of potential action and the opportunity for the licensee to modify its conduct. Additionally, as noted in our prior action in this proceeding, an opponent of a renewal application -- such as a mutually exclusive applicant -- may well have a strong incentive to raise allegations of obscenity at renewal time, even where no parallel concern exists in the local community at large. For this reason as well, then, it is imperative that we maintain our usual practice of reviewing complaints of this nature contemporaneously with the relevant broadcasts.

18. Furthermore, considering obscenity allegations in the context of contemporaneous complaints ensures that, in appropriate cases, the Commission may refer those complaints to the Justice Department for consideration of a timely criminal prosecution. license term for a television station is now five years, and that for a radio station is seven. 47 U.S.C. § 307(c). Additionally, a comparative renewal proceeding may very well take several years, through initial designation, ALJ and Review Board action, before it is presented to the full Commission. If the full Commission, after the conclusion of these layers of review, were to conclude that referral to the Justice Department is the appropriate action, then delaying review of obscenity issues until renewal may impede the Justice Department's ability to evaluate complaints and to institute prosecutions before the statute of limitations runs. The statute of limitations for violations of section 1464 is five years. 18 U.S.C. § 3282.

19. If obscenity allegations are not raised contemporaneously, the Commission might also be deprived of the opportunity to consider, in an appropriate case, the possibility of imposing a forfeiture against a licensee as an alternative to referring the matter to the Department of Justice. A forfeiture might not pose all of the disadvantages which we noted in our prior action with respect to the complete adjudication of an obscenity issue, because it does not require a full hearing. If the licensee resisted paying the forfeiture, a trial would be held before a United States district court, not before the Commission. 47 U.S.C. § 504(a). A forfeiture must be imposed within the specific time frames enumerated in the Communications Act. 47 U.S.C. § 503(b)(6).

20. Finally, a lengthy delay in the consideration of obscenity issues raises the troubling question of whether any forum -- either a district court or the Commission -- could adequately apply the contemporary community standards criterion in a proceeding initiated years after the relevant broadcast. There would always be the concern as to whether the decision of the trier of fact was based on community standards that were indeed contemporary at the time of the broadcast.

21. Raising allegations of obscenity in a timely manner, therefore, is a less intrusive and more appropriate method of enforcement. We have noted similar concerns in connection with our previous enforcement of the fairness doctrine. *Fairness Doctrine Alternatives*, 2 FCC Rcd 5272, 5278 66 50-51 (1987). We have likewise stated that conventional broadcast indecency complaints should be filed at the time of broadcast or shortly thereafter. *See Infinity Broadcasting Corp. of Pa.*, FCC 87-365 at n.49.

22. In the present case, there were no complaints filed contemporaneously with any of the broadcasts at issue that would have provided the Commission with a basis for considering whether Video had violated section 1464 by broadcasting obscene programming. The record in this proceeding reveals that most of the complaints regarding Video's broadcasts were not filed contemporaneously, but were filed after December 1, 1982 (the expiration of the license term at issue here), in connection with this renewal proceeding. Of the complaints filed before the expiration of the relevant license term, none presented the prima facie showing necessary for the Commission to initiate an investigation into a possible obscenity violation.[5]

23. The record shows that the Commission received a number of complaints regarding Video's programming from residents prior to the expiration of Video's license term. Only a few of these complaints, however, actually raised concerns about sexually explicit programs being aired by Video; and those complaints that raised these concerns made generalized charges, without alleging any facts that, if true, would have allowed the Commission to

determine that the law had been violated.[6] As a result, the Commission appropriately did not pursue enforcement actions at the time of their receipt.

24. Because none of the complaints refer to any programs broadcast in particular, it is impossible to tell whether any of the complainants raise concerns about *Pandora's Mirror* or any of the other specific programs that Monroe has placed into the record as part of its challenge to Video's renewal.[7] We note that not even Monroe alleged a violation of section 1464 before the ALJ as part of Video's basic qualifications, although it now argues fervently for the Board's addition of the issue (even seeking reconsideration of an interlocutory order) so as to better its posture in its challenge to Video's renewal. The actual facts regarding *Pandora's Mirror* and the other programs are now before us for the first time in this renewal proceeding. For the reasons discussed above, however, absent a contemporaneous prima facie showing of a possible violation of section 1464, the Commission is not now in a position to consider the issue in the context of this renewal proceeding. As many as seven years may have passed since the broadcast of Video's programming,[8] and we believe that this fact alone would frustrate an attempt to undertake consideration of the obscenity issue consistent with the public interest.[9] We therefore conclude that the public interest will be served best by deleting the obscenity issue designated by the Review Board.

25. Monroe asks the Commission to consider immediately questions now pending before the Review Board concerning whether Video 44 is entitled to a renewal expectancy for its past programming record. The Board held this matter in abeyance pending Commission action on the obscenity issue. FCC 86R-62 (Sept. 25, 1986). That issue having been resolved by today's action, this case is now ready for appropriate action by the Review Board. We see no reason to grant the extraordinary relief sought by Monroe in by-passing intermediate review by the Review Board before presentation of the case to the full Commission. We, therefore, deny Monroe's request.

IV. ORDER

26. ACCORDINGLY, IT IS ORDERED, That the Motion for Leave to File Petition for Reconsideration filed May 19, 1986 by Monroe Communications Corporation, and the Motion of Monroe Communications Corporation for Leave to File Second Supplement filed October 10, 1986 ARE GRANTED.[10]

27. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed May 19, 1986 by Monroe Communications Corporation, as supplemented July 31, 1986, and October 10, 1986, IS GRANTED to the extent indicated herein and is otherwise DENIED; and that paragraphs 8 through 14 of the memorandum opinion and order of the Commission, FCC 86-167 (Apr. 16, 1986) (103 FCC 2d 1204) ARE MODIFIED to the extent reflected in this Order.

28. IT IS FURTHER ORDERED, That the Motion for Consolidation and Certification, filed October 7, 1986 by Monroe Communications Corporation, and the Motion to Strike, filed November 3, 1986 by Video 44 ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] This term expired December 1, 1982.

[2] As noted by the Review Board (102 FCC 2d at 410), this case -- which involves subscription as opposed to conventional broadcast service -- does not call into play the issue of indecency. Consistent with existing case law, the Commission does not impose regulations regarding indecency on services lacking the indiscriminate access to children that characterizes broadcasting. *See Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (subscription nature of cable television and other technical capabilities of cable to restrict children's access to indecent cable programming forecloses municipality's ability to impose additional regulations on cable indecency); see also *Jones v. Wilkinson*, 800 F.2d 989 (10th Cir. 1986), aff'd 102 S.Ct. 1559 (1987).

[3] In the case of a federal obscenity statute, the Supreme Court has held that, unless otherwise specifically stated, the relevant conduct proscribed by the statute is the "hard core activity described in the *Miller* decision. *United States v. 12 200 - ft Reels of Film*, 413 U.S. 123, 130 n.7 (1973), citing *Miller v. California*, 413 U.S. at 25. *See* also *Hamling v. United States*, 418 U.S. 87, 110-16 (1974).

[4] The effect of an obscenity determination is to ban certain speech altogether, rather than merely to channel it to late night hours, as with non-obscene, adult oriented programming. Therefore, applying a standard that attempts to approximate a local standard might appropriately take into account the development of obscenity law by the lower courts, as discussed above. Furthermore, as mentioned below, in a proceeding in which the Commission issued a forfeiture against a licensee without a full hearing, the licensee could avail itself of a trial de novo in a local district court. This procedure may also afford the opportunity to have the obscenity issue judged by local decisionmakers. These issues, however, are not raised by this case, and we need not definitively resolve them here.

[5] In order to initiate an investigation into a possible obscenity violation, Commission practice has required a prima facie showing by a complaining party. As a general matter, such showing requires the complainant to allege sufficient facts about a specifically identified program that would allow the Commission to determine that a violation may have occurred. Generalized complaints about a licensee's programming have never been enough to justify an investigation by the Commission.

[6] When complainants raise issues that implicate the First Amendment rights of licensees, the Commission is especially loath to second-guess the editorial judgments of broadcasters without a sufficient factual basis for believing that the law has been violated. *See* supra note 5. We follow this approach in our enforcement of indecency, as well as political broadcasting, violations.

[7] Because the complaints fail to state a prima facie case, it is also difficult to tell whether any of the letters received after December 1, 1982, complain about programs aired during the license term at issue here.

[8] Because none of the complaints presented a prima facie showing, it is difficult to tell when any of the offending programming was actually aired. This fact further underscores the need for complete complaints filed contemporaneously with the relevant broadcasts.

[9] As noted above, if we were to affirm the Review Board's designation of the obscenity issue, the ALJ in this proceeding may very well find himself in the position of having to discern and to apply the contemporary community standards of 1981 (when,

according to the record, Video began airing the programming at issue). Similarly, because these issues were raised in the context of a complicated renewal proceeding, where several layers of Commission review have already occurred, it is no longer possible for the full Commission to refer any of these complaints -- even if they did present prima facie showings -- to the Justice Department. The applicable statute of limitations has already run. 18 U.S.C. § 3282. This result may have occurred even if this case had proceeded in the normal course of events, uncomplicated by the difficult policy issues raised by the STV renewal expectancy and obscenity questions. Additionally, failure to raise the obscenity issue contemporaneously has foreclosed our ability to issue a timely notice of apparent liability as a prerequisite to a forfeiture. 47 U.S.C. § 503(b)(6).

[10] Monroe did not seek leave to file its July 31, 1986 supplement. However, because good cause has been shown for granting reconsideration in part here, and because Monroe sought leave to file its original petition for reconsideration and its second supplement, we will overlook Monroe's omission.

CONCURRING STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

IN RE: Applications of Harriscope of Chicago, Inc., *et. al.*, a Joint Venture d/b/a VIDEO 44
For Renewal of License of Station WSNS-TV, Channel 44, Chicago, Illinois and
MONROE COMMUNICATIONS CORPORATION, Chicago, Illinois for a Construction Permit

I concur in the result the majority reaches, *i.e.*, that the obscenity issue the Review Board added against *Video 44* should be deleted. I also agree that the Commission's earlier decision in *Video 44*, 103 FCC 2d 1204 (1986), should be reversed to the limited extent that it sets a negative precedent and takes the absolute position that the Commission would *never* make obscenity determinations in the first instance.

I support the majority's conclusion that *Video 44* should not preclude the Commission from *ever* considering obscenity issues. I, nevertheless, write separately to underscore my belief that Commission review of obscenity issues in the first instance should only be warranted in the most extraordinary circumstances.

I also believe that, because of the significant First Amendment issues involved, it is more prudent for the Commission to refer obscenity questions to the Department of Justice ("DOJ"). DOJ can determine whether prosecution is warranted. If so, federal or local prosecutors then litigate in a local forum where the appropriate legal standards for obscenity will be applied. Even the majority acknowledges that "it may be preferable, in most cases, to deal with questions of obscenity in the context of a previously adjudicated prosecution in a local judicial district. . ." Memorandum Opinion and Order at para. 11, p. 5. I, however, would state unequivocally that this *is* the preferable approach. Moreover, initiating Commission proceedings to resolve these issues would strain the limited resources of this agency and its expertise.

To the extent that the majority's decision discusses the legal standard that should be applied by this national administrative agency in obscenity cases, I believe that it has placed the cart before the horse. That difficult issue is not presented by the case before us, and it is, therefore, premature to address it. These Commission views should not be construed as anything other than the *obiter dicta* which they are.

The proper time to determine *whether* the Commission should consider obscenity issues in the first instance, and what standard should be applied by a national administrative agency making obscenity determinations, will come only when an appropriate case presenting extraordinary circumstances comes before the FCC. It is neither necessary nor appropriate to reach out to make even tentative conclusions on these significant matters in this decision.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-1

In the Matter of

Annual 1988 Access Tariff Filings

ORDER

Adopted: February 1, 1988 ; Released: February 2, 1988

By the Chief, Common Carrier Bureau:

1. The American Telephone and Telegraph Company (AT&T) has filed a motion for extension of time, until February 10, 1988, to respond to the petition for reconsideration filed by Contel Corporation (Contel) of this Bureau's December 24, 1987 Order in the above-captioned proceeding.[1] AT&T Motion, filed Jan. 29, 1988 at 1. Under Sections 1.106(g) and 1.4(g) of the Commission's Rules, 47 C.F.R. §§ 1.106(g) and 1.4(g), AT&T has until February 3, 1988, to file its response. Contel does not oppose AT&T's motion.

2. AT&T argues that it needs a one-week extension of time because it did not receive a copy of Contel's petition at its New Jersey headquarters until January 27, 1988 because "Contel apparently did not serve AT&T, and because of logistical delays in obtaining the Petition from alternative sources." AT&T Motion at 1-2. AT&T further states that key AT&T personnel who must analyze Contel's petition are currently unavailable because they are participating in an industry forum. *Id.* at 2.

3. Under Section 1.46 of the Commission's Rules, 47 C.F.R. § 1.46, extensions of time are not to be routinely granted. In this case, however, we find that AT&T has shown good cause for the requested extension. Moreover, granting a one-week extension will not impede our consideration of the issues raised by Contel's petition. Therefore, we grant AT&T's motion for an extension of time. We also extend this grant of additional time to any other interested party. Accordingly, all oppositions to Contel's petition for reconsideration must be filed no later than February 10, 1988.

4. Therefore, IT IS HEREBY ORDERED that the request of the American Telephone and Telegraph Company to extend the time in which to file a response to the petition for reconsideration filed by Contel Corporation in the above-captioned proceeding IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTE

[1] Petition for Reconsideration of Contel Corporation, filed Jan. 21, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-1
Phase I

In the Matter of

Annual 1988 Access
Tariff Filings

ORDER

Adopted:January 27, 1988; Released: January 28, 1988

By the Chief, Common Carrier Bureau:

1. Western Union Corporation has filed a motion for extension of time, until February 18, 1988, to file an opposition to the direct cases submitted in the investigation of the Annual 1988 Access Tariff Filings.[1] Western Union Motion, filed January 19, 1988, at 1. In the Order designating issues for investigation, this Bureau allowed local exchange carriers (LECs) until January 25, 1988, to file their direct cases or tariff filings addressing the issues, and allowed non-LEC parties until February 4, 1988, to file oppositions to the direct cases or tariff filings.[2]

2. Western Union agrees that the investigation should be expedited, but argues that this proceeding should not be held to "patently unreasonable procedural schedule" because of the amounts at stake and the important issues involved. Western Union Motion at 2-3. Western Union states that it needs one week to enter the data into its computers before it can begin analyzing them. *Id.* at 2. MCI filed comments in support of the motion, asserting that the demand issue is one of the most complex problems raised by the LEC annual filings, and that the 10-day period is insufficient to permit meaningful analysis of the direct cases and tariff filings. MCI Comments, filed Jan. 20, 1988, at 1-2.

3. Based upon our initial examination of the transmittals and direct cases, we deny Western Union's request for extension of time, with one important exception. In general, we believe that the allotted time will provide a fair opportunity for interested parties to address the fairly narrow issue regarding inconsistencies in the use of special access demand quantities for ratemaking which was the basis for suspending certain LEC special access rate increases. We conclude that an extension of time to consider the suspended increases is not justified, in view of our statutory mandate to "give the hearing and decision of such questions preference over all other questions pending before [us] and decide the same as speedily as possible," 47 U.S.C. § 204(a).

4. This phase of the investigation, however, also includes direct cases filed by carriers whose demand methodologies did not appear to be inconsistent or whose proposals did not include increases. By allowing interested parties additional time to comment on the latter groups of carriers, we believe that we can effectively reduce the scope of the initial round of comments and focus these comments on the higher-priority issues presented by the suspended rates. We will, therefore, grant an extension of time to file oppositions regarding all tariffs which are not subject to suspension until further notice.

5. The LEC tariff revisions will be available for examination through the Tariff Division reference room. The direct cases will be available through the Commission's Docket Branch, 1919 M Street, N.W., Room 230.[3] Copies are available through the Commission's copy contractor, International Transcription Services, Inc., Room 246.

6. Accordingly, IT IS HEREBY ORDERED that the request of the Western Union Corporation to extend the time in which to file a response to the direct cases and tariff filings submitted by local exchange carriers in CC Docket No. 88-1, Phase I, IS DENIED, except to the extent indicated herein.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] It also requested that the local exchange carriers (LECs) be required to serve their filings by hand to the other parties in the proceeding. We denied Western Union's request for service by hand in a previous Order. Annual 1988 Access Tariff Filings, Order, CC Docket No. 88-1, Phase I, DA 88-49 (released Jan. 21, 1988).

[2] Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase I, Designation Order, DA 88-16 (released Jan. 14, 1988) at para. 8.

[3] Tariff transmittals proposing corrections to the prior transmittals in lieu of direct cases were filed by: Ameritech Operating Companies, Bell Atlantic, Cincinnati Bell Telephone Company, New England Telephone and Telegraph Company, and US West. Direct cases were filed by: Bell South, GTE Corporation, New York Telephone, Pacific Northwest Bell, Southern New England, and Southwest Bell.

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-107

In the Matter of

Amendment of Part 15 of the
Commission's Rules Concerning Input
Selector Switches Used in
Conjunction with Cable Television
Service

ORDER GRANTING STAY REQUEST

Adopted: January 27, 1988; Released: January 28, 1988

By the Commission:

1. By this Order, we are staying the implementation of our recently adopted technical standards for input selector switches used to alternate between over-the-air television service and cable television service pending resolution of requests for reconsideration in this proceeding. This action is in response to a Request for Stay filed by the Consumer Electronics Group of the Electronic Industries Association (EIA) on December 18, 1987 in conjunction with a Petition for Reconsideration it filed on that same date addressing the transition procedures of the new rules.

2. On November 19, 1987, the Commission adopted a *Report and Order* in GEN Docket No. 87-107 (*Report and Order*), FCC 87-357, which, *inter alia*, amended Part 15 of its rules to extend technical regulations to all transfer switches used to alternate between over-the-air television service and cable televison service. These standards require that both external, stand-alone switches and switches built into television receivers must provide at least 80 dB of isolation over the frequency range of 54 to 216 MHz inclusive, and 60 dB from 216 to 550 MHz. The Commission found that these levels of isolation are necessary to prevent signal leakage that could cause interference to other licensed radio services, including aeronautical navigation and communications. The Commission also adopted transition provisions that were intended to minimize the burden of the new standards on switch suppliers with respect to existing equipment that do not meet the prescribed isolation levels. The implementation plan exempts existing broadcast/cable input selector switches installed in consumers' premises and in manufacturers', distributors', and retailers' inventories as of January 28, 1988. New units of broadcast/cable switches manufactured or imported on or after that date that do not comply with the new rules also are exempt if they are sold or otherwise distributed to a final user, i.e. consumer, by October 28, 1988, if they do not require an external power source, and by April 28, 1989, if they require an external power source.

3. In its Petition for Reconsideration, the EIA states that the above implementation plan imposes substantial, unnecessary, and unintended burdens associated with the redesign and marketing of switches on manufacturers of TV receivers and switching accessories. It contends that manufacturers are not in a position to redesign their products before January 28, 1988 nor will they be able to control the final sale date of products manufactured after that date. EIA states that as a practical matter, the marketplace for transfer switches and for television receivers that incorporate transfer switches will be disrupted if the sale of products manufactured after January 28, 1988 is made unlawful should they not be sold by the specified dates. It seeks revision of the transition procedures to apply the rules only to devices manufactured after the October 28, 1988 and April 28, 1989 effective dates currently specified, without regard to sale. In its Request for Stay, EIA asks that the Commission defer the effective dates for compliance with the new Part 15 technical standards pending resolution of its request for reconsideration. Zenith Electronics Corporation (Zenith) filed a statement of support for EIA's petition for reconsideration and request for stay. Zenith states that the implementation deadlines should be imposed at the importation or production level, rather than at the retail sales level, to avoid disruption of product planning and market distribution functions.

4. Gill Industries, Inc. (Gill) filed an Opposition to the EIA's requests for reconsideration and stay. Gill claims that a stay of the compliance date of the isolation standards beyond January 28, 1988 will heighten the risk that faulty switches will remain available to subscribers until and beyond July 1, 1990, rendering it virtually impossible for cable systems to comply with the cumulative leakage index (CLI) requirements. Gill further submits that a stay is not necessary to prevent disruption to the manufacture and marketing of non-complying switches. It states that such switches may still be used with other TV interface devices such as computers, video games and VCR's. Pico Macom, Inc. (Pico), filed a Partial Opposition to the EIA's stay request. Pico opposes the EIA's request only to the extent that the stay would apply electromechanical and electronic stand-alone switches. It claims that a delay is not necessary for stand-alone switches because several manufacturers already make such switches that comply with the new standards and other complying switches will be on the market in early 1988. Pico also expresses concern that postponing the implementation of the new technical standards could lead to greater use of substandard switches that could result in substantial radio interference

5. We find that the concerns expressed by the EIA and Zenith for disruption of equipment manufacturing and supply activities merit careful examination in the context of reconsideration. We also are persuaded that continued adherence to the transition procedures previously adopted pending resolution of EIA's request for reconsideration could produce uncertainty that might be significantly disruptive to manufacturers, suppliers and retailers involved in the marketing of broadcast/cable switching equipment. We disagree with Gill and Pico that a stay of the effective date of the switch standards is likely to lead to increased interference. As we observed in the *Report and Order*, there is no indication that there are problems of interference resulting from use of broadcast/cable switching such that there is an immediate need to limit or restrict existing models of switching equipment that do not meet the new standards.[1] Nonetheless, we continue to believe it is desirable to shift to equipment that meets the new standards as quickly as is reasonably possible and therefore intend to complete our action on reconsideration requests in this

proceeding in an expeditious manner. On this basis, we will grant the EIA's request for stay of the effective date the input selector switch technical standards.

6. Accordingly, IT IS ORDERED that the Request for Stay filed by the Consumer Electronics Group of the Electronic Industries Association IS GRANTED. Sections 15.64, 15.606, 15.616 and 15.622 of the Commission's rules ARE STAYED pending further action by the Commission. This stay does not apply to other actions adopted in the *Report and Order* in GEN. Docket No. 87-107. *See* also *Order* (FCC 87-396, released December 23, 1987) staying certain other portions of GEN. Docket 87-107. Authority for this action is provided in Sections 4(i) and 303 of the Communications Act of 1934, as amended.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Secretary

FOOTNOTES

[1] *See* Report and Order, supra, at para. 30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-484

In Re

Reexamination of the
Commission's Comparative
Licensing, Distress Sales
and Tax Certificate Policies
Premised on Racial, Ethnic
or Gender Classifications

ORDER

Adopted: January 14, 1988 **Released: January 14, 1988**

By the Commission

1. On December 17, 1986, the Commission adopted a *Notice of Inquiry (Notice)* [1] in this proceeding to reexamine certain policies based on racial, ethnic or gender classifications. These policies are first, the application of racial, ethnic, and gender preferences in comparative licensing proceedings for broadcast stations; second, the administration of the Commission's distress sale policy to permit minority acquisition of broadcast stations designated for hearing on basic qualifications issues; and third, the issuance of tax certificates for sales of broadcast properties to minorities. The reexamination of these policies was prompted by questions raised by an order of the United States Court of Appeals of the District of Columbia Circuit in *Steele v. FCC* [2].

2. In the *Notice*, the Commission ordered the presiding administrative law judges, the Review Board, and the Office of the General Counsel to hold in abeyance all decisions in comparative licensing proceedings in which the award of a racial/gender preference was dispositive, pending resolution of this proceeding. [3] The Commission further ordered the Mass Media Bureau to hold in abeyance all pending or future applications for distress sale authority pursuant to the minority ownership policy statement[4] until the court reached a final determination in *Shurberg Broadcasting of Hartford, Inc. v. FCC*,[5] a case challenging the Commission's distress sale policy, or until the Commission reached a final resolution of this proceeding.

3. On December 22, 1987, the President signed into law House Joint Resolution 395, which contains the appropriations legislation for the Commission for fiscal year 1988.[6] This legislation appropriated money for Commission salaries and expenses with the following pertinent proviso:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, *as amended* 52 R.R. 2d [1301] (1982) [sic] and *Mid - Florida Television Corp.*, [69] F.C.C. 2d 607 Rev. Bd. (1978) [sic], which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

4. In compliance with this law, we will close MM Docket No. 86-484, and terminate the reexamination of our comparative licensing, distress sale and tax certificate policies based on racial, ethnic or gender preferences.

5. In further compliance with this law, we will continue to implement our comparative licensing, distress sale and tax certificate policies based on racial, ethnic or gender classifications that were in effect prior to September 12, 1986.[7]

6. In further compliance with this law, we will rescind our orders in this proceeding (1) to hold in abeyance decisions in comparative licensing proceedings in which the award of a racial/gender preference is dispositive; and (2) to hold in abeyance all pending or future applications for preferential treatment under our distress sale policy. All cases held in abeyance pursuant to the *Notice* will be processed in accordance with Commission policies and standards in effect prior to September 12, 1986.

7. Accordingly, IT IS ORDERED that MM Docket No. 86-484 is hereby closed and terminated, and that the Commission staff shall cease all actions to repeal, retroactively apply changes in, or reexamine its comparative licensing, distress sale and tax certificate policies designed to expand minority and female broadcast station ownership.

8. IT IS FURTHER ORDERED that the Commission staff continue to implement its comparative licensing, distress sale, and tax certificate policies designed to further minority and female ownership of broadcast properties in effect prior to September 12, 1986.

9. IT IS FURTHER ORDERED that (1) the presiding administrative law judges, the Review Board, and the Office of the General Counsel process all comparative licensing cases in a manner consistent with Commission policy in effect prior to September 12, 1986; and (2) the Mass Media Bureau process all applications for distress sale authority pursuant to the minority ownership policy statement in a manner consistent with prior Commission policy.

10. Pursuant to Section 553 of the Administrative Procedure Act, the Commission finds for good cause that the Order adopted herein may be promulgated without prior public notice and comment thereon because the Commission's action is mandated by Pub. L. No. 100-202 (signed Dec. 22, 1987).

11. IT IS FURTHER ORDERED that this Order shall become effective upon adoption. Good cause exists for such action. *See* para. 10 *supra*.

12. Authority for the action taken herein is contained in Section 4(i) of the Communications Act of 1934, as amended, and Pub. L. No. 100-202 (signed Dec. 22, 1987).

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] 52 Fed. Reg. 596 (Jan. 7, 1987).

[2] Case No. 84-1176 (D.C. Cir. *motion for remand granted* Oct. 9, 1986).

[3] *See also Order*, MM Docket No. 86-484, 2 FCC Rcd 2377 (1987).

[4] *Statement of Policy on Minority* Ownership of Broadcast Facilities, 68 FCC 2d 979 (1978).

[5] Case No. 84-1600 (D.C. Cir. motion for remand granted June 25, 1987).

[6] Making Further Continuing Appropriations for Fiscal Year 1988 and for Other Purposes, Pub. L. No. 100-202 (signed Dec. 22, 1987).

[7] As discussed in detail in the Notice, these policies have been articulated in a series of policy statements and Commission and court decisions. In addition to the sources cited in the appropriations legislation, minority preference policies were established in TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: February 18, 1988

FEE DECISIONS OF THE MANAGING DIRECTOR AVAILABLE TO THE PUBLIC

The Managing Director is responsible for responding to requests for waiver or deferral of fees as well as other pleadings associated with the fee collection process. Typically, these responses to individuals are not released to the public or published in the FCC Reports (*See* 0.445 (a) of the rules).

However, in order to provide the public with a clearer understanding of this new process, these decisions will be made available to the public. Periodically, the Managing Director will release a Public Notice listing the decisions he has made on these matters. The decisions will then be will be placed in General Docket 86-285. A copy of the decision will also be placed in the appropriate docket, if one exists. In the future, it may be decided to publish only those decisions that establish new precedents or may be of wide interest. All decisions will continue to be placed in the appropriate docket.

The following Managing Director decisions are released for information:

U.S. Satellite Corp., Inc.- Waiver of Commission's Fee Denied - Statutory Deadlines (May 20, 1987)

Empire State Broadcasting - Waiver of Commission's Hearing Fee Denied (June 30, 1987)(MM Docket No. 87-110)

New Life Christian Services Association - Advisory Opinion - Qualifications for Statutory Exemption (July 8, 1987)(MM Docket No. 87-137)

C&H Broadcasting - Waiver of Commission's Station License Fee Denied - Commission Directed Modification (July 8, 1987)

Desert Springs Communications - One check, bank draft or money order per application. 47 C.F.R. S1.1108 - Petition Granted (July 13, 1987)

Larry S. Kinane - Waiver of Commission's Land Radio Service (Marine) Fee Denied - Exempt Service Providers (July 21, 1987)

Wesley Godfrey - Petition for Reconsideration Granted - Failure to Pay Required Filing Fee (July 21, 1987)

Rural Television Service - Comments - Commission Will Consider Pleadings (July 24, 1987)

Davidson County Broadcasting, Inc. (WKOQ-FM94.1) - Waiver of Commission's Low Power Auxiliary Station License Fee Denied (August 11, 1987)

Wesley Godfrey d/b/a Shreveport Community Television - Application for Review Dismissed as Moot (August 21, 1987)

Heritage Communications, Inc. - Petition for Declaratory Ruling Deferred until Reconsideration/Waiver of Commission's Fee for Extension of Time to Consummate Transfers of Control Granted (August 21, 1987)

Comcast Corporation - Request for Declaratory Ruling - Name Change Notification Not Feeable (September 18, 1987)

Spanish International Communications Corporation-Waiver of Commission's Earth Station License Granted (September 22, 1987)

Beasley Broadcasting - Waiver of Commission's Fee for Amendment to Construction Permit Denied (October 23, 1987)

Karl H. Stoll - Refund of Commission's Fee Granted (October 28, 1987)

Bruce F. Baer (Estate of W.B. Belche, Sr.) - Waiver of Commission's Fee for Assignment of License Denied (November 3, 1987)

Gary Van Veghton - Applications Granted, if Otherwise Grantable, Pending Outcome of Reconsideration - Refund may be Required (November 10, 1987)(MM Docket No. 87-245)

Pyramid Communications, Inc. - Request for Declaratory Ruling - Applications Granted, if Otherwise Grantable, Pending Outcome of Reconsideration - A fee May Later be Required (November 10, 1987)(MM Docket No. 87-165)

One Hundred One Broadcasting, Inc. - Waiver/Deferral of Commission's Hearing Fee Denied (November 10, 1987)(MM Docket No. 87-352)

Wesley Godfrey - Request for Reconsideration of Dismissal of Notice of Appearance Denied - (November 30, 1987)(MM Docket No. 87-87)

David R. Crosby (WSKI - Montpelier, VT)-Waiver of Commission Fee for Amendment Granted (December 2, 1987)

Don H. Barden - Petition to Accept Late Filed-Notice of Appearance Denied (December 7, 1987)(MM Docket No. 87-178)

Rochelle Lucas d/b/a Carpenter Broadcasting - Request for Reconsideration of Fee Section Action Granted (December 11, 1987)

Shoreline Broadcasting - Request for Reinstatement of New Commercial Broadcast Station Denied (December 21, 1987)

Kamp Airport, Inc. - Waiver of Commission's Fee for Aeronautical Advisory Station License Denied (December 21, 1987)

Equatorial Communications Services and American Satellite Company-Waiver of Commission's Fee for Transfers of Control Granted In- Part (December 21, 1987)

Crisler Communications - Waiver of Commission's Hearing Fee Denied (December 23, 1987)(MM Docket No. 87-449)

For further information, contact Thomas M. Holleran at (202) 632-5316.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Revision of Part 73, Subpart G
of the rules concerning the
Emergency Broadcast System (EBS)

ORDER

Adopted: January 29, 1988; Released: February 18, 1988

By the Commission:

1. The Commission has determined that Part 73, Subpart G contains many outdated and obsolete terms concerning the Emergency Broadcast System (EBS). Continued use of the outdated nomenclature causes confusion.

2. Terms such as "National Industry Advisory Committee (NIAC) Orders", "Basic EBS Plan", and "500" Net are obsolete. The NIAC was disestablished by the Commission in 1986 and replaced by two new committees: the National Security and Emergency Preparedness (NSEP) Advisory Committee and the Emergency Broadcast System (EBS) Advisory Committee. Also in 1986, the National level "500" and "300" networks and the Presidential Audio Line through Radio Station WTOP(AM) were replaced by the new Emergency Action Notification (EAN) Network. Moreover, the rules have been updated to recognize that additional entities (e.g., cable systems and program suppliers) are voluntarily participating in EBS.

3. Accordingly, IT IS ORDERED that pursuant to the authority contained in Section 1, 4(i), 4(o) and 303(r) of the Communications Act of 1934, as amended, Part 73 of the Commission's rules IS AMENDED, as set forth in the Appendix below, effective **April 4, 1988.**

4. For further information concerning this action, contact the Management Planning and Program Evaluation Office at (202) 632-3906.

5. The Commission finds for good cause that prior notice and comment procedures are unnecessary. *See* 5 U.S.C. § 553(b)(B). These amendments merely update our rules by eliminating obsolete nomenclature and recognize that additional entities are voluntarily participating in EBS. Thus, no purpose would be served by soliciting the comments of the public.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX

Pursuant to the authority contained in Section 1, 4(i), 4(o) and 303(r) of the Communications Act of 1934, as amended, Title 47 of the Code of Federal Regulations, Part 73 is amended as follows:

1. The authority citation for Part 73 continues to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. Section 73.909 is amended by revising the first paragraph and paragraph (c) to read as follows:

§ 73.909 Standard Operating Procedures (SOPs).

The SOPs are issued by the FCC and contain detailed operational instructions which are used for activating, terminating and testing the National level EBS. They are issued to specified control points of the national radio and television networks, participating cable systems and common carriers, the wire services, and other participating organizations.

* * * * *

(c) SOP-3, the National Information Center. This SOP contains the detailed operational and authentication procedures for the distribution of United States Government national releases and official information.

3. Section 73.910 is revised to read as follows:

§73.910 Authenticator Word Lists.

The Authenticator word lists are issued by the FCC annually. These include the Red and White envelopes and the National Information Center (NIC) booklet. The lists are used in conjunction with procedures contained in the EBS Checklists and SOPs for tests or actual National emergency situations.

(a) EBS Authenticator List - Red Envelope. This document is used for authentication purposes in conjunction with the procedures contained in the EBS Checklists and the Standard Operating Procedures (SOPs) 1 and 2. It is issued to all broadcast stations and specified control points (national radio and television networks, participating cable systems and common carriers, the wire services, and other participating organizations).

(b) EBS Authenticator List - White Envelope. This document is used for caller identification purposes in conjunction with the Last Resort procedures in SOP-1 and SOP-2, and is issued to the above specified control points.

(c) NIC Authenticator List - Booklet. This document is used for authentication purposes in conjunction with the procedures contained in SOP-3. It is issued to participating control points.

4. Section 73.911 is deleted.

5. Section 73.912 is revised to read as follows:

§ 73.912 Emergency Broadcast System Participants.

The following non-government industry entities voluntarily participate in the Emergency Broadcast System (EBS):

(a) Radio and Television Networks.

1. ABC Radio and ABC-TV.
2. Associated Press Radio (APR).
3. CBS Radio and CBS-TV.
4. Mutual Broadcasting System (MBS).
5. MUZAK.
6. NBC Radio.
7. NBC-TV.
8. National Public Radio (NPR).
9. Public Broadcasting Service (PBS-TV).
10. Satellite Music Network.
11. Transtar.
12. United Press International Audio (UPIA).
13. United Stations.

(b) Cable Systems and Program Suppliers.

1. Cable News Network (CNN).
2. Christian Broadcasting Network (CBN).
3. Disney Channel.
4. Entertainment and Sports Programming Network (ESPN).
5. Movie Channel.
6. MTV.
7. Nashville Network.
8. Nickelodean.
9. Showtime.
10. VH-1.

(c) Wire Services.

1. Associated Press (AP).
2. United Press International (UPI).

(d) Common Carriers.

1. American Telephone and Telegraph (AT&T).

6. Section 73.918 is amended by adding a new sentence at the end of the Section to read as follows:

§73.918 Non-participating Station (Non-EBS).

* * * * *

This is a broadcast station which has elected not to participate in the National level EBS and does not hold an EBS Authorization. Upon activation of the EBS at the National level, such stations are required to broadcast the EBS Attention Signal and the appropriate EBS message, then remove their carriers from the air and monitor for the Emergency Action Termination in accordance with the instructions in the EBS Checklist for Non-Participating Stations. All broadcast stations (including Non-Participating Stations) are required to comply with Section 73.932.

7. Section 73.922 is amended by revising paragraph (c) as follows:

§ 73.922 Emergency Broadcast System programming priorities.

* * * * *

(c) During a national emergency the radio and television (aural) broadcast network program distribution facilities shall be reserved exclusively for distribution of Presidential Messages and National Information. National Information which is not broadcast at the time of original transmission shall be recorded locally by the CPCS stations for broadcast at the earliest opportunity consistent with Operational (Local) Area requirements.

8. Section 73.926 is amended by revising paragraph (c), deleting existing paragraph (d) and redesignating paragraph (e) as paragraph (d) as follows:

§ 73.926 Participation in the Emergency Broadcast System.

* * * * *

(c) Any station may change its EBS status from Participating to Non-participating (see §73.918) by giving 30 days written notice and by returning its EBS Authorization to the FCC.

(d) Any AM, FM, TV, or Low Power TV broadcast station or cable network or system may, at the discretion of management, voluntarily participate in the State level and Operational (Local) level EBS in accordance with the provisions of the State EBS Operational Plan. An EBS Authorization is not required.

9. Section 73.927 is amended by revising paragraphs (a), (b), and (d) to read as follows:

§ 73.927 Participation by communications common carriers.

(a) Communications common carriers which have facilities available in place may, without charge, connect an independent broadcast station to the radio and television (aural) broadcast networks or participating cable systems for the duration of the activation of the National level EBS; provided that the station has in service a local channel from the station's studio or transmitter directly to the broadcast source or a broadcast connection point.

(b) During the activation of the National level EBS, communications common carriers which have facilities in place may, without charge, connect an originating source from the nearest exchange to a selected Test Center and then to the radio and television (aural) broadcast networks and partici- pating cable systems for the duration of the emergency: provided, that:

(1) The originating source has in service a local channel from the originating point to the nearest Exchange.

(2) An Emergency Action Notification is requested by the White House.

(c) * * *

(d) During Closed Circuit Tests of the National level EBS, communications common carriers which have facilities in place may, without charge, connect an originating source from the nearest Exchange to a selected Test Center and then to the radio networks and any participating television networks and cable systems. No participating independent station may be connected during the test unless authorized by the FCC. Upon termination of the tests, all participating networks shall be restored to their original configuration.

* * * * *

10. Section 73.931 is amended by revising the title of the section, paragraphs (a), (a)(2) and (a)(3) are revised, paragraph (a)(4) is added, and paragraphs (b) and (c) are revised to read as follows:

ACTIVATION ACTIONS

§ 73.931 Dissemination of Emergency Action Notification.

(a) National Level. The Emergency Action Notification (EAN) will be released at this level upon request of the White House. The EAN message is disseminated from the origination point on a dedicated network to control points of the radio and television networks, participating cable systems and communications common carriers, the wire services, and other participating organizations. The EAN is then further disseminated as follows by:

(1) * * *

(2) The wire services to all subscribers (AM, FM, TV, and Low Power TV and other stations).

(3) Off-the-air monitoring of AM, FM, TV, and Low Power TV broadcast stations and other licensees and regulated services.

(4) The participating cable systems to all subscribers.

* * * * *

(b) State level. The dissemination arrangements for the EAN at this level originate from the State and Federal government authorities in accordance with the State EBS Operational Plan.

(c) Operational (Local) Area level. The dissemination arrangements for the EAN at this level originate from local government authorities in accordance with the Local EBS Operational Plan.

* * * * *

11. Section 73.932 is amended by revising paragraphs (a) and (d)(1) to read as follows:

§ 73.932 Radio monitoring and Attention Signal transmission requirements.

(a) Monitoring Requirement. To insure effective off-the-air monitoring (§73.931(a)(3)), all broadcast station licensees must install and operate, during their hours of operation, equipment capable of receiving the Attention Signal and emergency programming by other radio or television stations. This equipment must be maintained in operative condition, including arrangements for human listening watch or automatic alarm devices. This equipment must be installed in the broadcast station, either at the transmitter control location and/or studio location, in such a way that it enables the broadcast station staff, at normal duty locations, to be alerted instantaneously upon the receipt of the attention signal and to immediately monitor the emergency programming. For situations where broadcast stations are co-owned and co-located (e.g. an AM and FM licensed to the same entity at the same location) with a combined studio facility, only one receiver is required if installed in the combined studio facility. The off-the-air signal monitoring assignment of each broadcast station is specified in the State EBS Operational Plan.

* * * * *

(d) * * *

(1) Appropriate entries must be made in the station log, indicating reasons why the Weekly Test Transmissions were not received. Weekly Trans- missions of the Test Script, even without the encoder, must be conducted.

* * * * *

12. Section 73.933 is amended by revising paragraphs (b)(1) and (b)(2), adding paragraph (b)(5)(i)(d), and revising paragraph (b)(12) to read as follows:

§ 73.933 Emergency Broadcast System operation during a National Level emergency.

* * * * *

(b) * * *

(1) Monitor the radio and television networks, and/or the participating cable systems, for further instructions from the network control point.

(2) Check the wire services (AP/UPI). Verify the authenticity of the message with the current EBS Authenticator List (Red envelope).

* * * * *

(5) * * *

(i)(d) Participating cable networks and systems.

* * * * *

(12) Broadcast stations holding an EBS Authorization are specifically exempt from complying with §73.62 and §73.1560 (pertaining to maintenance of operating power) while operating under this subpart of the rules.

* * * * *

13. Section 73.935 is amended by adding paragraph (c) to read as follows:

§ 73.935 Day-to-day emergencies posing a threat to the safety of life and property; State Level and Operational (Local) Area Level Emergency Action Notification.

* * * * *

(c) Cable networks and systems may voluntarily participate in the EBS in accordance with the provisions of the State EBS Operational Plan.

14. Section 73.936 is amended by revising paragraphs (d) and (d)(3) to read as follows:

§ 73.936 Emergency Broadcast System operation during a State Level emergency.

* * * * *

(d) Immediately upon receipt of a State level Emergency Action Notification, all licensees and cable networks and systems participating may at the discretion of management, proceed as follows:

(1) * * *

(2) * * *

(3) All licensees and cable networks and systems participating in the State level EBS shall discontinue normal programming and follow the trans- mission procedures set forth in the appropriate EBS Checklist and State EBS Operational Plan (§73.921) under the State and Local Level Instructions. Stations which provide foreign language programming may transmit emergency announcements in the foreign language prior to broadcasting such announce- ments in English. TV stations shall display an appropriate EBS slide and then transmit all announcements visually and aurally in the manner described in §73.1250(h).

* * * * *

15. Section 73.937 is amended by revising paragraphs (d) and (d)(3) to read as follows:

§ 73.937 Emergency Broadcast System operation during an Operational (Local) Area Level emergency.

* * * * *

(d) Immediately upon receipt of an Operational (Local) Area Level Emergency Action Notification message, all licensees and cable networks and systems participating may, at the discretion of management, proceed as follows:

(1) * * *

(2) * * *

(3) All licensees and cable networks and systems participating in the Operational (Local) Area level EBS shall discontinue normal programming and follow the transmission procedures set forth in the State and Local EBS Operational Plan. Stations which provide foreign language programming may transmit emergency announcements in the foreign language prior to broadcast- ing such announcements in English. TV stations shall display an appropriate EBS slide and then transmit all announcements visually and aurally in the manner described in §73.1250(h).

* * * * *

16. Section 73.942 is amended by revising paragraph (b) to read as follows:

§ 73.942 Acceptability of EBS Attention Signal equipment.

* * * * *

(b) A decoder device used for the detection of the EBS Attention Signal shall be certified following the applicable procedures set forth in Subpart J of Part 2 and Subpart B of Part 15 of the Rules and Regulations. This requirement shall also apply to decoders which are part of a broadcast receiver. The data and information submitted shall show capability of the equipment to meet the requirements of §73.941.

* * * * *

17. Section 73.961 is amended by revising paragraph (a) and the title sentence of paragraph (b) to read as follows:

§ 73.961 Tests of the Emergency Broadcast System procedures.

(a) Weekly Emergency Action Notification (EAN) Network Transmissions. Test transmissions of the National level interconnection facilities will be conducted on a random basis once each week. The tests will originate on an alternate basis from one of two origination points over a dedicated government network to the control points of the radio and television networks, participating cable systems and common carriers, the wire services, and other participating organizations. These tests will be in accordance with the procedures set forth in EBS SOP-2 which is furnished to the non-government entities concerned.

(b) Periodic Wire Service Test Transmissions.* * *

18. Section 73.962 is amended by revising paragraphs (a), (c), (d), (e), (e)(2), (e)(3) and (e)(6) to read as follows:

§ 73.962 Closed Circuit Tests of approved National level interconnecting systems and facilities of the Emergency Broadcast System.

(a) Tests of approved National level interconnecting systems and facilities of non-government entities voluntarily participating in the EBS will be conducted on a random or scheduled basis not more than once a month and not less than once every three months only after FCC approval. The time of the test will be selected by both the White House and participating industry personnel in coordination with the FCC. Unless a random Closed Circuit Test has been selected, the FCC will notify the networks, wire services and participating cable systems and common carriers of the selected time window, four working days (holidays excluded) prior to the test.

(b) * * *

(c) The control points of the radio and television networks, the wire services and the participating cable systems and common carriers will receive notification of the Closed Circuit Tests by a "Closed Circuit Test Activation Message".

(d) The National level EBS will be tested on a closed circuit basis. These test broadcasts will originate from a point selected by the White House with program feed circuitry connected to the Telephone Company Toll Test Center at points coordinated for each test. Participating common carriers will interconnect, as required, the facilities of the radio networks and any other participants in the test. The telephone companies are not authorized to add any of the independent stations participating in the EBS unless authorized by the FCC. Authentication will be provided to the Telephone Company Toll Test Center or other program entry location responsible for the particular test arrangements to be used. Authentication used in the Closed Circuit Test Message will be the test words printed on the outside of the EBS Authenticator List - Red Envelope.

(e) Closed Circuit Test procedures for radio network affiliates, wire service subscribers, and if participating, television network affiliates and cable systems are as follows:

(1) * * *

(2) Immediately monitor your radio network (and if participating, your television or cable system) and check your wire service teletype machine for the receipt of the Closed Circuit Test Activation Message. Verify authenticity using the test words printed on the outside cover of the current issue of the EBS Authenticator List - Red Envelope.

(3) Continue to monitor your radio network (and if participating, your television network or cable system) for the audio talkup and the Closed Circuit Test audio program.

(4) * * *

(5) * * *

(6) Following the closing cue as indicated in paragraph (e)(5) of this section, wire service subscribers only will receive a "Closed Circuit Test Termination Message". Record the time of receipt of this messge as indicated in paragraph (e)(4) of this section.

* * * * *

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 79-184

In the Matter of

Inquiry into the Policies to Be Followed in the Authorization of Common Carrier Facilities to Meet North Atlantic Telecommunications Needs During the 1991-2000 Period

THIRD NOTICE OF PROPOSED RULE MAKING

Adopted: January 14, 1988 **Released: January 15, 1988**

By the Commission:

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I. INTRODUCTION

1. We hereby give notice of a proposed Rule Making to develop the policies and guidelines we shall apply in acting upon requests by the United States International Service Carriers (USISCs)[1] and the Communications Satellite Corporation (Comsat) for authority to participate in the construction and use of submarine cable and satellite transmission facilities in the North Atlantic Region[2] during the 1991-2000 period. We initiated this phase of the above-captioned docket with the release of our Fourth Notice of Inquiry (Fourth NOI) on April 10, 1987.[3]

2. In this Notice of Proposed Rule Making (NPRM), we examine the facilities planning information, alternative facilities plans and the analyses of those plans submitted by the USISCs and Comsat as well as the comments and reply comments filed by all parties and the information and views exchanged in the North Atlantic Consultative Process (NACP). [4] Based on our review of the record of this proceeding, we reach certain tentative conclusions. Specifically, we tentatively conclude that the public interest will be served by the introduction of a digital, optical fiber TAT-9 cable system as early as 1991. However, we reach no tentative conclusion concerning the specific configuration for such a cable -- in particular on the question of whether a sixth landing point in Portugal for the cable should be provided. Instead, we request further comments on this issue. We find that the record before us does not provide sufficient information on which to base tentative conclusions relating to the specifics of follow-on satellites for the Atlantic Ocean Region INTELSAT V series satellites. However, we tentatively conclude that the question of the INTELSAT V series follow-on satellites can appropriately be addressed in the instructional process and in our application processes. We also tentatively conclude

that consideration of North Atlantic facilities projected for implementation during the latter portion of the 1991-2000 period can be deferred.

3. Below we briefly set forth the history of the earlier phases of this docket. We then summarize the Fourth NOI which initiated the current phase of this proceeding. We next summarize: the planning information, alternative facilities construction and use plans and the analyses of those plans filed by the USISCs and Comsat; the comments and reply comments filed by all parties to this proceeding; and the information and views exchanged in the NACP. We then analyze this information and reach certain tentative conclusions.

II. BACKGROUND

4. We initiated this docket and began our process for developing policies and guidelines for the construction and use of cable and satellite transmission facilities to meet demands for common carrier services in the North Atlantic Region during the 1985-1995 period with the release of a Notice of Inquiry on August 1, 1979.[5] On January 16, 1981, we released a Report and Order setting forth policy guidelines for the construction and use of North Atlantic facilities.[6] The policy guidelines we adopted included a finding that both the B-7 and L-1 designs for the INTELSAT VI series of satellites that INTELSAT then had under consideration were acceptable and that the public interest would be served by the introduction of a digital, optical fiber cable as early as 1988. We deferred consideration of post-1992 North Atlantic facilities and the issues concerning: (1) the provision for restoration of service following a major facility failure; (2) the appropriate method for distributing traffic among available facilities;[7] and (3) the specific configuration of facilities.[8]

III. THE FOURTH NOTICE OF INQUIRY

5. With the issuance of our Fourth NOI, we began the phase of this docket for developing policies and guidelines for the construction of cable and satellite transmission facilities to satisfy demands for common carrier services on North Atlantic routes during the 1991-2000 period.[9] We indicated that we were specifying 1991 as the beginning of the period under consideration in order to allow consideration of a USISC proposal for implementation of a TAT-9 digital, optical fiber cable as early as 1991.[10] We also indicated that we were extending the period under consideration from 1995 to 2000 because we believed that consideration of traffic forecast, technological options and other planning information for only the five year period between 1991-1995 was too limited to permit proper evaluation of alternative facilities plans. We further noted that consideration of only a five year period could tend to exclude from our deliberations important technological advances such as 16 kilobit per second (kb/s) voice encoding which has the potential for doubling the voice transmission capacity of existing and future digital cable and satellite facilities utilizing 32 kb/s voice encoding.

6. We stated in our Fourth NOI that we intended to seek essentially the same types of planning information and utilize the same types of analyses we had employed in past facilities planning proceedings. However, we noted that some modifications might be necessary to reflect changes in the international telecommunications environment. We requested the USISCs and Comsat to submit planning data including traffic forecasts, available technological facilities options, cost information, service reliability information and alternative facilities plans which assumed use of different facilities and vary the time of introduction of new facilities. We stated that the alternative plans would be analyzed in terms of demand flexibility, cost, service reliability, foreign correspondents' acceptance, furtherance of our pro-competitive policies, technological risk and other relevant factors. We also stated that, in view of the rapid changes in the environment in which international telecommunications are provided, additional factors will include examination of the current state of competition in the provision of international services, the rate at which such competition is increasing and the effects of the alternative plans on the growth of competition. We also specifically requested the parties to the proceeding to address the effect of alternative facilities plans on the four objectives -- open entry, nondiscrimination, technological innovations and international comity -- that we established to examine the interrelationship of foreign telecommunications policies and practices to our regulatory policies in our Notice of Inquiry and Proposed Rule Making.[11] We also noted that we would welcome comments concerning whether Portugal should be added as a sixth landing point country from the standpoint of technical feasibility, cost differential and other factors. We also encouraged parties to comment on the relationship of the proposed configuration of TAT-9 to the four policy objectives we established in CC Docket No. 86-494.

IV. RESPONSES TO THE FOURTH NOI

A. *Parties Responding to the Fourth NOI.*

7. Our Fourth NOI established dates by which responses to our questions requesting information relevant to the planning of North Atlantic facilities and for a series of comments and reply comments were to be filed. General comments and responses to the Appendix A questions[12] were to be filed no later than May 11, 1987. General comments were filed by AT&T on behalf of itself and a number of the other USISCs[13], Comsat, Comsat International Communications, Inc. (CICI), and Private Transatlantic Telecommunications System, Inc. (PTAT, formerly Tel-Optik, Ltd.). The Department of Defense (DoD) filed a request for leave to become a party to the proceeding.

8. Responses to Appendix A question were also filed on May 11, 1987 by AT&T on behalf of itself and the joint USISCs, Comsat and the Hawaiian Telephone Company (HTC). Traffic forecasts were filed individually by each USISC with requests that those filings be accorded confidential treatment. AT&T, FTCC, HTC, ITT Worldcom, MCII and US Sprint filed their forecasts on May 11, 1987. TRT filed its forecast on May 21, 1987 accompanied by a request to accept a late filed pleading. WUTCO filed its forecast on June 1, 1987 also accompanied by a request to accept a late filed pleading. RCA Globcom filed its forecast on June 2, 1987 accompanied by a request to accept a late filed pleading.[14]

9. Reply comments and comments on responses to Appendix A were filed May 26, 1987 by Comsat; Pan American Satellite (PanAmSat); and AT&T, MCI, TRT and US Sprint jointly.

10. Responses to Appendix B were filed on June 4, 1987 by Comsat the collective USISCs, and ITT (which requested confidential treatment of its submission). Com-

ments on responses to Appendix B, due June 19, were filed by the USISC's, Comsat and PTAT. Pursuant to a request from the Bureau staff, AT&T on June 23 submitted its circuit loading assignments for each location in the North Atlantic region for the period 1987 through 2000, for which confidential treatment was requested. Finally, AT&T filed a reply to the prior comments of Comsat and PTAT on June 29, 1987.

11. On August 20, 1987, the DOS submitted a Memorandum pertaining to a Portugal landing point for the TAT-9 cable which the Embassy of Portugal requested the DoS to forward to us. On November 9, 1987, Comsat submitted a letter stating that it would no longer oppose the construction of the TAT-9 cable system as proposed by the USISCs provided that we accept the AT&T-Comsat agreement pertaining to AT&T's use of Comsat's INTELSAT space segment capacity as consistent with the public interest and rely upon that agreement as a basis for withdrawing all guidelines for the distribution of AT&T's International Message Telecommunications Service (IMTS) circuits in CC Docket No. 87-67.

B. ***General Comments and Responses to Appendix A (May 11, 1987)***

12. *The USISCs.* In their joint general comments, the USISCs state that AT&T, Teleglobe Canada (Teleglobe), British Telecommunications PLC (BT), the Ministere des Postes et Telecommunications of the Republic of France (DGTF) and Compania Telefonica Nacional of Spain (Telefonica) had announced the signing of an Agreement to Plan and Implement TAT-9. The agreement contemplated a ready for service date for TAT-9 as early as 1991. Contemporaneously, the parties to this agreement invited potential co-owners to join in the TAT-9 project and become parties to the TAT-9 Construction and Maintenance Agreement (TAT-9 C&MA). The USISCs further state that the TAT-9 C&MA was signed in Madrid, Spain on March 18, 1987 by twenty-five parties. Additional parties are expected to sign the C&MA shortly. The TAT-9 C&MA specifies that the TAT-9 cable will be placed in service in 1991 and will have a configuration with cable landings in the United States, Canada, the United Kingdom, France and Spain.

13. According to the USISCs the transatlantic portion of the proposed TAT-9 cable will provide two traffic bearing fiber pairs operating at 565 Megabits per second (Mb/s) between the two Underwater Branching Multiplexers (UBM) or "Wet Multiplexers."[15] The western UBM will be used to connect the United States and Canadian branches to the two transatlantic traffic bearing fiber pairs. The eastern UBM will connect the United Kingdom, France and Spain branches to the transatlantic traffic bearing fiber pairs.[16]

14. The USISCs note that the proposed TAT-9 will provide twice the capacity of the digital optical fiber TAT-8 cable system.[17] The USISCs state that the proposed TAT-9 cable will employ advances in fiber optic technology and bring the advantages of these technological advances to the North Atlantic region as soon as possible. As noted above, the fiber pairs in the proposed TAT-9 cable will operate at 565 Mb/s rather than at the 280 Mb/s transmission rate of the fiber pairs in the TAT-8 cable. TAT-9 will thus be able to provide twice the capacity of the TAT-8 cable system utilizing the same number of traffic bearing fiber pairs. The proposed TAT-9 cable will also utilize 1.5 micron wavelength lasers rather than the 1.3 micron wavelength lasers which will be utilized in TAT-8. Use of 1.5 micron wavelength lasers will permit increase spacing between repeaters in the TAT-9 cable and result in lower costs and greater reliability according to the USISCs. As noted above, TAT-9 will also use UBMs which will provide more efficient and flexible networking within the cable.

15. In response to our comments in paragraph 10 of the Fourth NOI regarding 16 kb/s voice encoding technology, the USISCs state in a footnote that

> At its current stage of development, 16 kb/s voice encoding will not pass voiceband data. Until this technological obstacle can be overcome, this technology cannot be utilized.

16. The USISCs argue the need to implement TAT-9 by October 1991 on the basis of their projections of increased demand in the North Atlantic region, attributed in particular to anticipated rapid growth of wide band digital services (*e. g.*, video transmission and dedicated private networks); the requirement of compatible digital restoration capability for TAT-8; the desirability of scheduling the service date for TAT-9 to coincide with that for MAT-2; and a proposed fiber optic cable system between Italy and Spain.[18] As to the addition of Portugal as a fourth European landing point country, the USISCs submit that the European parties to the TAT-9 C&MA could not agree to include two Iberian landing points in the system's configuration. Because the Spain landing point is essential to the digital interconnectivity of the TAT-9 cable with the MAT-2 and EMOS-1 cables, a Portugal landing point was not deemed feasible.

17. The USISCs contend that a follow-on system to TAT-9 will likely be required by the late 1990's due to the expected fill of TAT-8 and TAT-9 and the scheduled retirement of several earlier transatlantic cables.[19] The USISCs also contest the level of detail requested in Appendices A and B of the Notice as inconsistent with the Commission's promotion of competition in the international telecommunications environment through initiatives intended to stimulate intermodal competition between the providers of satellite and undersea cable transmission facilities. The carriers argue that marketplace forces will do a more effective job of facilities planning than traditional regulatory processes. Since competitive pressures force the U.S. carriers to judiciously plan their facilities needs, they believe that Commission involvement at the level of detail required in Appendices A and B is unnecessarily burdensome. The Commission is already involved in the decisions concerning new facilities through the North Atlantic Consultative Process (NACP) and Section 214 application process and should endeavor to rely to a greater degree on marketplace forces to regulate facilities planning decisions.

18. As noted in the foregoing list of pleadings filed, while the USISCs jointly filed their responses to most of the questions contained in Appendix A of our Fourth NOI, they filed their traffic forecasts individually. Our staff has combined these individual traffic forecasts and the resulting total USISC forecast is set forth in Appendix 1 of this Third NPRM.

19. The USISCs set forth in their joint response to Appendix the existing North Atlantic submarine cables in service, the capacity of each cable and its planned retirement date as follows:

CABLE	CAPACITY NO. OF 3 kHz CIRCUITS	PLANNED RETIREMENT DATE
TAT-5	845	1993
TAT-6	4229	2003
TAT-7	4246	2009
CANTAT-2	1890	1996

In addition, TAT-8, a digital, optical fiber cable, is scheduled to be placed in service in mid-1988. TAT-8 will provide 7,560 64 kb/s circuits.

20. In response to our question pertaining to technological alternatives available during the 1991-2000 period, the USISCs indicate that AT&T's undersea lightguide (SL) family of large capacity, digital, optical fiber submarine cable systems will be available for use during this period. The SL family of cables is designed to provide one, two or three fiber pairs, with or without repeaters and operate at nominal line information rates of 140 Mb/s, 280 Mb/s and 565 Mb/s. The USISCs state that similar cable systems of British and French manufacture are also available.

21. The USISCs indicate that Digital Circuit Multiplication Systems (DCMS) will be used during the planning period to increase the capacity of digital facilities. For planning purposes, DCMS is considered to provide a multiplication ratio of five-to-one for voice circuits. DCMS will derive 150 virtual voice circuits from 30 64 kb/s circuits. DCMS will employ Digital Speech Interpolation (DSI) and Adaptive Differential Pulse Code Modulation (ADPCM) techniques to provide the necessary multiplication. A Variable Bit Rate (VBR) strategy will insure acceptable service levels during peak traffic periods according to the USISCs. The USISCs also describe other circuit multiplication equipment in their joint response to Appendix A.

22. With respect to satellite facilities, the USISCs note the availability of Intermediate Data Rate (IDR) digital carriers from INTELSAT. The USISCs state that IDR digital carriers use coherent Quadrature Phase Shift Keying (QSPK) modulation operating at information rates ranging from 64 kb/s to 44.736 Mb/s. Any information rate within this range can be transmitted. However, INTELSAT has defined a set of recommended information rates based on CCITT hierarchical rates and CCITT ISDN rates. A 3/4 Forward Error Correction (FEC) rate is required to be employed on IDR carriers having a 10 Mb/s or less information rate. FEC for IDR carriers having 10 Mb/s or higher information rates is currently under study. The nominal bit Error Rate (BER) is 10 -7.

23. In response to our Appendix A question concerning the costs of each cable system which could be made available for North Atlantic region use during the 1991-2000 period, the USISCs provided estimated costs for the proposed TAT-9 cable system. Based on 1987 price levels, the USISCs estimate the capital costs of TAT-9 will be approximately $400 million. Land and building costs for TAT-9 are estimated to be an additional $5 million. The USISCs estimate that interest during construction will be approximately $56 million or 14 per cent of cost.[20] The USISCs indicate that these cost estimates are based on analysis of previous cable systems such as TAT-8, Mainland-Hawaii-4, Transpacific-3 and Guam-Philippines-2. The estimate includes the USISCs' best estimate of future technology cost as well as other cost inputs received from studies in the United Kingdom and France.

24. *Comsat.* In its general comments, Comsat outlines INTELSAT's "current nominal satellite deployment plan," which anticipates six satellites in orbit in the Atlantic Ocean Region (AOR), including a spare. Comsat expects that the INTELSAT VI series will provide the workhorse capacity for North Atlantic CEPT-to-U.S. service through and beyond the 1990's. The INTELSAT Vs, VAs and VI series satellites all have been procured. However, the plan would require three follow-on satellites (FOS) in the region during the mid-1990's. Comsat notes that unexpected contingencies during the next five years may give rise to a requirement for an additional satellite procurement.

25. Comsat asserts that its planning objective is to respond to consumer needs, by improving service and reducing costs, rather than to increase its rate base or pursue technological change for its own sake. To achieve its stated objective, Comsat states it is endeavoring to maximize the use of the INTELSAT VIs satellites but notes that planning is underway to make it possible to obtain additional AOR capacity in 1988, if necessary, as a complement to the FOS that will be needed to replace the INTELSAT Vs in the Pacific Ocean Region (POR). In Comsat's view, this approach "puts greater emphasis on innovative service offerings which stimulate ground segment involvement to increase the efficiency with which satellites are used." Comsat conditions these statements on the inability to make precise projections through the year 2000 given the novelty of the bearer circuit concept.

26. In its response to Appendix A, question III (Technical Alternatives (for 1987-2000 period)), Comsat states that three INTELSAT VI satellites are to be launched in 1989-1991 for AOR services. The nominal plan calls for three follow-on satellites (FOS) in the 1993-1995 time frame. Four FOS concepts are being considered. Type A is an all K-band spacecraft tailored for Atlantic service. Comsat states that bids for this type of spacecraft recently solicited by INTELSAT have been set aside until the completion of a comprehensive assessment of space segment needs.

27. Type B FOS would include 18 high power K-band transponders and 12 C-band transponders, K/C band interconnectivity, and coverage flexibility well suited to AOR "rim" locations (307 'E and 359 'E). FOS-Bs would be able to accommodate IBS services and encourage the use of small earth stations carrying intermediate data rate traffic. FOS-C spacecraft would include 26 C-band transponders, mid-ocean connectivity, 12 K-band transponders, and K/C-band interconnectivity, a package Comsat states makes the spacecraft best suited for orbital slots in the central AOR and POR.[21]

28. FOS-D spacecraft, as originally conceived, were to provide all of the K-band capability of an FOS-B as well as the full C-band capability of an FOS-C. The intent was to incur the one-time development cost of a single large spacecraft suitable for deployment in lieu of either the B or C types or combinations thereof. Comsat states, however, that due to launch vehicle considerations, a "scaled down" FOS-D concept has been developed, but its performance is more limited and it may not be efficiently utilized in ocean-rim roles. Given the above considerations, Comsat states that the nominal FOS complement in the AOR in the 1991-1995 timeframe would consist of two FOS-B and one FOS-C satellites.

29. *PTAT.* PTAT has received Commission authorization to construct and operate two private fiber-optic cables (PTAT-1 and PTAT-2) between the U.S. and the U.K.

Under its grant of authority, PTAT is a private venture not subject to Commission Section 214 regulation. As such, PTAT's activities are not subject to either the Commission's North Atlantic facilities planning docket or the NACP. This fact notwithstanding, PTAT asserts that the existence of its facilities and other alternative North Atlantic communications facilities should be considered in the instant proceeding. PTAT-1, scheduled to be operational by June 1989, is projected to be able to provide 85,050 voice-grade circuits in the North Atlantic region. PTAT-2, which is expected to have the capacity of at least 110,000 voice-grade circuits, is scheduled for operation in 1992. PTAT submits that, given the significant increased capacity represented by PTAT-1 and PTAT-2, that PTAT-1 capacity alone will be sufficient to provide 100% restorative service for TAT-8 and that if its facilities are to be utilized by common carriers, the Commission should take PTAT-2 into account in its determination of policies and guidelines governing additional ratepayer-funded facilities in the North Atlantic region during the 1991-2000 period.

C. *Reply Comments (May 26, 1987)*

30. *Joint Reply of AT & T, MCII, TRT and US Sprint.* These carriers oppose Commission consideration of PTAT's private cables in the North Atlantic planning process. They charge PTAT with attempting now to have its planned PTAT-1 and PTAT-2 facilities included in the process, a position at odds with that taken by PTAT (then Tel-Optik) in its application for a cable landing license. The carriers state that as non-common carrier systems, PTAT's proposed cables are not subject to Title II regulation and are therefore outside the purview of the NACP. Since the present docket was initiated by the Commission as an adjunct to the NACP, the Commission has no legal authority to consider them in this context. Furthermore, the carriers characterize PTAT's position as an attempt to foreclose intramodal competition between TAT-9 and PTAT-1 by seeking to eliminate the former. The carriers contend that insofar as none of the USISCs filing planning information in this docket have thus far indicated their intent to use PTAT-1 and PTAT-2, the Commission should not address the question of consideration of private systems in the NACP until PTAT's cables are constructed and the actual nature and amount of traffic can be determined.[22]

31. *Comsat.* Comsat opposes the introduction of TAT-9 in 1991 on the grounds that the cable and satellite facilities already authorized and under construction will be sufficient to carry all projected traffic in the North Atlantic at least into the mid-1990's. Comsat asserts that the forecast data submitted by the USISCs in response to Appendix A of the *NOI* refutes their claim that TAT-9 is needed in 1991 to meet increased demand. Comsat argues that the total USISC demand forecast for the planning period appears to be less than that submitted to the North Atlantic Consultative Working Group (NACWG) in May 1986; data which itself was 25-30 percent less than that presented when TAT-8 (the prior generation cable) was first proposed. These factors, together with the evidence that U.S.-CEPT traffic growth for 1986 did not exceed 10 percent, form the basis for Comsat's argument that TAT-9 cannot be justified on the basis of increased demand.

32. As for the USISCs argument that TAT-9 will further technological innovation, Comsat asserts that the new undersea fiber optic cable "promises only modest . . . improvements" (*e. g.*, 1.5 micron wavelength lasers, 565 Mb/s capacity and "wet multiplexing) which, by itself, is not sufficient to justify authorization considering that full exploitation of the technological capabilities of 16 Kbps voice-encoding equipment on existing and planned satellite and cable facilities for the transmission of voice-band data may prove to be a more cost-effective restoration alternative expense of TAT-8 than the start-up, maintenance and regulated rate base expenses of TAT-9. Comsat contends that 16 Kbps voice-encoding equipment should be able to support a voice-band data rate of 2400 Kbps and be available by the mid-1990s.

33. Finally, Comsat claims that the USISCs have ignored the provision in the prior authorized TAT-8 C&MA permitting the modification of the single-bident TAT-8 configuration to include a branch landing in Spain given a "firm commitment for a digital submarine cable network in the Mediterranean which would be connnected to TAT-8 via the Spanish landing point." In so doing, Comsat contends, the USISCs are seeking to avoid the acknowledgment that TAT-9 is not needed for interconnection with fiber optic cables from Spain to Italy (MAT-2) and between Italy, Greece, Turkey and Israel (EMOS-1).

34. *PanAmSat.* PanAmSat, conditionally authorized to construct a separate satellite telecommunications system restricted to non-common carrier operations, requests that the Commission consider the availability of its space segment capacity in evaluating the need for new North Atlantic facilities during the post-1991 planning period. Although PanAmSat's facilities and services do not fall within the purview of this docket, its six planned Ku-band transponders intended for trans-Atlantic services will be available to common carriers under the terms of its grant of authority. The Commission has made no final decision on the use of these transponders for U.S.-Europe service.

35. PanAmSat asserts that the USISCs have not adequately taken into account the availability of non-INTELSAT space segment in developing their forecasts for the next decade, in particular the restoration capacity of such systems. PanAmSat urges the Commission to review carefully Comsat's plans for construction for new satellites on the grounds that INTELSAT and Comsat have a history of launching satellites based upon overestimates of the demand for new INTELSAT services, and then selling the excess capacity below cost for the provision of domestic services.

D. *Reply Comments on Appendix A and Responses to Appendix B (June 4, 1987)*

36. *Comsat.* Comsat presents three alternative plans for the use of INTELSAT satellites in the AOR during the 1991-2000 timeframe. Plan 1, based on INTELSAT's current nominal plan, provides for deployment of six satellites in the region to accommodate U.S.-CEPT traffic growth beyond that forecast in the 1986 INTELSAT Traffic Data Base; three VI-series satellites to be launched by 1993 and three FOSs to replace three INTELSAT Vs which will reach end-of-life in the mid-1990s. Plan 2 is identical to Plan 1 with the exception that only five satellites would be deployed; the V-series satellite at 359'E would not be replaced when it reaches end-of-life if not justified economically and by market demand. Plan 3 reduces to four the number of new generation satellites in the Atlantic region at the end of the planning period; the satellite roles at 359'E and 325'E would be discontinued when the current Vs reach end-of-life. Comsat emphasizes that Plans 2 and 3 are illustrative only and do not reflect decisions

actually taken by INTELSAT's Signatories. Comsat states, however, that its work to date suggests that Plans 2 and 3 could result in substantial economies. Furthermore, Comsat states that under all three Plans there would be substantial satellite capacity available to meet future needs, even considering the possibility that traffic growth is much greater than currently anticipated and setting aside sufficient capacity to restore TAT-8. According to Comsat's estimate, the satellite capacity available for U.S.-CEPT traffic growth in 1993, even under Plan 3, would be equivalent to the total capacity of TAT-9, assuming the use of circuit multiplication techniques. Therefore, Comsat urges the Commission to adopt a policy for the 1991-2000 period which provides only for those additional facilities necessary to meet market demand. In May of 1987, Comsat states, the INTELSAT Advisory Committee on Planning expressed a preference for a type C FOS which is said to combine the best features of the type C connectivity satellite and the type B ocean-rim satellite so as to permit its use in a variety of roles.

37. *USISC Joint Response*.[23] The carriers submitted one plan which provides for the implementation of the TAT-9 fiber optic submarine cable in 1991, contemplates the probable need for a follow-on cable in the late 1990s and provides for the extensive, continued use of satellite capacity. They assert that the TAT-9 plan is the result of "in-depth review, consideration and negotiation among the USISCs and over 20 foreign telecommunications administrations" and is designed to maximize the economic efficiency of their facility investments. The TAT-9 C&MA was signed by 25 parties on March 18, 1987.[24] The MAT-2 C&MA, signed on the same day, will not become effective until the TAT-9 C&MA comes into force. The C&MA for EMOS-1 has been initialed by all parties. MAT-2 and EMOS-1, designed in large measure to extend traffic from North America and the U.K. to the Mediterranean region, are dependent on the availability of TAT-9 in 1991. The USISCs dispute Comsat's contention that a Spanish landing point on TAT-8 could obviate the need for TAT-9. The carriers assert that the TAT-8 Spanish landing point option is not viable because the Mediterranean telecommunications community has now reached agreement on a Spanish landing point for TAT-9 and "strongly prefers the direct digital connectivity afforded through TAT-9, utilizing MAT-2 and EMOS-1."[25] Furthermore, the USISCs contend that, the TAT-8 Spain landing point alternative "ignores the demand requirements of the Canadian administration for its transatlantic needs."[26]

38. The USISCs justify the submission of a single plan for the 1991-2000 period as the best of various options considered by the carriers and their foreign correspondents. Marketplace conditions (*i. e.*, the competitive environment) no longer permit the carriers to devote months and years to the study of multiple facilities options before making a decision. Total capacity of TAT-9 will be 15,120 minimum assignable units of ownership (MAUOs). All assigned MAUOs are jointly owned. Approximately six percent of the total capacity remains unassigned and available for future use. Capacity pools have been created among the USISCs to accommodate entry of parties becoming partners subsequent to the signing of the TAT-9 C&MA and prior to the service date, and also to meet the needs of non-owners which wish to acquire capacity on an IRU basis.[27] The carriers contend that as the loading of TAT-8 increases, exclusive reliance on available satellites for restoration become more expensive per-circuit than the readily compatible digital restoration capability of TAT-9.

E. ***Comments on Appendix B Responses (June 19, 1987)***

39. *USISC Joint Response*. The carriers contend that Comsat's alternative facilities plans ignore the need of the USISCs and their correspondents for the TAT-9 cable in 1991. Further, they assert that none of Comsat's plans represent actual planning by INTELSAT but, rather, are merely Comsat's unilaterally developed hypothetical proposals which lack foreign correspondent support or acceptance.[28] Specifically, the USISCs note that although AT&T, through Comsat, has requested that INTELSAT commit to the continued operation of the satellite located at 359'E to provide service to India, Diego Garcia and Pakistan, two of Comsat's plans would eliminate this satellite at the end of its useful life.

40. The carriers also contend that Comsat's proposals would inhibit if not eliminate intermodal competition by making the USISCs totally dependent on satellite for additional capacity. In turn, acceptance of Comsat's proposals could enable Comsat to avoid lowering its satellite rates or introduce innovative rate plans to compete with fiber optic cables, while at the same time creating a shortage of needed fiber optic cable capacity.

41. Finally, the carriers claim that Comsat's Appendix submission, lacking in adequate cost analysis, does not present a realistic view of the expenditures required to support any of its plans; ignores potential increases in end-user demand for digital services better suited to submarine cables than to satellites; ignores national defense communications requirements; and would result in a degraded quality of service by precluding additional fiber optic media and path diversity.

42. *Comsat*. Comsat argues that in light of its statutory responsibility to the INTELSAT system, it views the principal issue of this proceeding not to be the timing of TAT-9 *per se*, but whether satellites will carry a reasonable share of the USISCs international traffic, including traffic growth, into the next decade. The need to pay for TAT-9 will provide an additional incentive for the carriers to load cables at the expense of satellites, causing a shortfall of traffic on the INTELSAT system. Comsat states that its concerns about the competitive viability of satellites can be met either through Commission action or by agreement among the parties.

43. Comsat also claims that the carriers' concern about launch vehicle availability is unfounded since INTELSAT has already procured three Ariane 4's for its VI-series spacecraft and is in the process of procuring two Titan III launch vehicles as replacements to two originally planned STS launches.

44. *PTAT*. PTAT argues that the minimal technological advances made available through TAT-9 do not justify the premature $200 million ratepayer commitment in a facility which will not be needed for the next ten years. PTAT also questions the validity of the USISCs demand forecast, particularly since the figures include projections assigning almost 25% of TAT-9 half-MAUOs to France and Germany although neither has yet signed the TAT-9 C&MA. In PTAT's view, the USISCs have failed to justify the 1991 introduction date of TAT-9 on the basis of demand, the novelty of fiber optic cables, or the need to interconnect with MAT-2 and EMOS-1 (given earlier representa-

tions to the Commission by the USISCs that the TAT-8 C&MA includes a provision permitting modifications to add a branch landing in Spain at an added cost of only $6 million plus the cost of 3 days' down time).

45. PTAT also contends that while its proposed facilities will not be directly supported by ratepayer revenues, the investment risk of TAT-9 will be borne entirely by the ratepayer. Therefore, in reaching its decision, the Commission should acknowledge the introduction of PTAT's privately-owned non-common carrier cables and consider the impact of these facilities on the need and timing of TAT-9. PTAT would justify this departure from prior Commission NACP deliberations as a necessary reflection of recently changed circumstances in the international telecommunications environment.

F. ***Reply Comments on Appendix B Responses (June 29, 1987).***

46. *AT & T.* AT&T states that rather than addressing the USISCs' Appendix B submission, Comsat merely repeats its plea for loading restrictions and a Commission-guaranteed share of AT&T's North Atlantic traffic. Since virtually all of AT&T's foreign correspondents are INTELSAT signatories and, like AT&T, have a significant financial stake in the INTELSAT system, AT&T asserts that neither they nor AT&T would allow INTELSAT's viability to be jeopardized. But continued viability should be dependent not upon artificial protectionist measures but on competitive rates and innovative services.

47. As for PTAT, AT&T argues that instead for promoting intramodal competition, PTAT proposes to make itself the sole source of additional cable capacity in the North Atlantic under the guise of ratepayer protection. AT&T finds this position directly at odds with the Commission's objectives and a complete reversal of the position it took when it sought cable landing licenses for PTAT-1 and PTAT-2.

G. ***Additional Pleadings***

48. By letter dated August 20, 1987, the DoS, at the request of the Embassy of Portugal, forwarded a Memorandum from the Embassy pertaining to the provision of a TAT-9 landing point in Portugal. The Memorandum notes that the May 21, 1987 Agreement to Plan and Implement TAT-9 includes a clause which allows for the provision of additional TAT-9 landing points if such additional landing points do not significantly harm the other parties. In view of this provision, the Portugese international telecommunications entity, Companhia Portuguesa Radio Marconi (CPRM), proposed two alternatives for providing a TAT-9 landing point in Portugal in addition to the planned European TAT-9 landing points in the United Kingdom, France and Spain.

49. CPRM's first alternative would place a UBM in the Spain Branch of TAT-9 to allow some of the capacity of that branch to be routed to Portugal. The second alternative proposed by CPRM would require the extension of a separate branch of TAT-9 to Portugal from the eastern UBM from which the TAT-9 branches to the United Kingdom, France and Spain are proposed to extend.

50. The Memorandum states that provision of a TAT-9 landing point in Portugal would provide two advantages. First, a Portugal landing point would provide more diversity and flexibility for the routing of United States traffic to other cables landing on the Iberian Peninsula, particularly those landing in Portugal. Second, provision of a Portugal landing point for TAT-9 would reduce the overall investment of the TAT-9 partners in that facility. The amount of the reduction, which is dependent on the cost allocation methodology and the cable configuration chosen, could be in the order of $25 million.

51. The Memorandum also states that DGTF has always supported the provision of a Portugal landing point. Portugal understood that AT&T, BT and Teleglobe were also, in principle, in agreement with such a landing point. However, the TAT-9 C&MA does not include a Portugal landing point for that cable.

52. Comsat filed a letter dated November 9, 1987 in which it sets forth the fact that, on October 9, 1987, it and AT&T filed Joint Supplemental Comments in our proceeding addressing post-1988 circuit distribution policy, CC Docket No. 87-67. That filing presented to us an agreement reached between Comsat and AT&T which: (1) establishes a set of commitments relating to AT&T's worldwide use of Comsat's INTELSAT space segment capacity for IMTS circuits through 1994; and (2) establishes a framework for discussions and the exchange of information that will provide a basis for AT&T's further use of Comsat's INTELSAT space segment capacity after 1994. Comsat notes that the Joint Supplemental Comments filed in CC Docket No. 87-67 contain an AT&T-Comsat request that we review the AT&T-Comsat agreement, accept it as consistent with the public interest and rely on it as a basis for withdrawing all loading guidelines for AT&T's IMTS circuits. Comsat states that if we grant this request and the Comsat tariffs referred to in the AT&T-Comsat agreement enter into force, Comsat will not oppose the construction of the TAT-9 cable as proposed by the USISCs.

53. On November 17, 1987, the DoD filed a Statement of the Department of Defense. The DoD's projection of its transoceanic circuit requirements for fiscal years 1988 and 1989 is appended to this pleading. The DoD states that it supports the timely installation of the TAT-9 cable. It notes that a significant number of the circuit requirements, particularly requirements for 1.54 Mb/s circuits, set forth in its projection are North Atlantic region requirements. The DoD estimates that its wideband digital requirements could quadruple during the next five to ten years. The DoD also states that it has special operational requirements that can be provided via the digital connectivity between TAT-9 and the Mediterranean optical fiber cables planned for 1991 activation.

54. The DoD supports a Portugal landing point for TAT-9. Assuming Portugal is willing to fund the prorated additional cost involved, the DoD believes the potential benefits to international communications warrant the inclusion of Portugal as a landing point. The DoD states that " . . . the addition of Portugal as a landing point would enhance the diversity of [the] TAT-9 system, thereby providing alternative routing and restoration capabilities to meet DoD's national security emergency preparedness requirements in the North Atlantic Region."

V. THE NORTH ATLANTIC CONSULTATIVE PROCESS

55. We continue to participate in the exchange of information and views pertaining to the construction and use of North Atlantic common carrier transmission facilities in both the NACWG and Senior Level meetings of the NACP. The submissions of the Canadian and CEPT delegations to the NACWG meetings as well as the discussions

at the NACWG and Senior Level meetings indicate that the Canadian and CEPT delegations, like the USISCs, favor the introduction of the TAT-9 cable in 1991. This position is also evident from the fact that the Canadian and at least fifteen CEPT telecommunications entities have signed the TAT-9 C&MA.

VI. DISCUSSION

A. *Overview*

56. We initiated this phase of CC Docket No. 79-184 with the release of our Fourth NOI for the purpose of developing policies and guidelines for the construction and use of cable and satellite transmission facilities to satisfy demand for common carrier services on North Atlantic routes during the 1991-2000 period. We requested the USISCs and Comsat to provide planning data including, *inter alia*, traffic forecasts, available technological facilities options, cost information, service reliability information and alternative facilities plans which assume use of different facilities and vary the time of introduction of new facilities. We stated that this information would be analyzed in terms of demand flexibility, cost, service reliability, foreign correspondent acceptance, furtherance of the Commission's pro-competitive policies, satisfaction of defense communications requirements and other relevant factors.

57. Below, we analyze the information and consider the analyses submitted by the USISCs and Comsat and reach tentative conclusions which, if ultimately adopted, will form a part of the policies and guidelines we will apply in our consideration of the USISCs' and Comsat's applications requesting authority to participate in the construction and use of North Atlantic facilities. Specifically, we tentatively conclude that the public interest will be served by the introduction of a digital, optical fiber TAT-9 cable as early as 1991. However, we reach no tentative conclusions regarding the specific configuration for that cable, particularly with regard to the question of whether a Portugal landing point for that facility should be provided in addition to the other three European landing points. We request further information on this issue. We also find that we have insufficient information pertaining to the INTELSAT follow-on satellites to be deployed in the Atlantic Ocean Region during the mid-1990's to reach any tentative conclusions regarding the number of such satellites to be deployed in the Atlantic Ocean Region and the capacity and other parameters of those satellites. However, we tentatively conclude that we can appropriately address the specifics of the follow-on satellites in our normal instructional[29] and application processes. We also tentatively conclude that the consideration of North Atlantic facilities projected for implementation during the latter portion of the 1991-2000 period can be deferred.

58. We must note at the outset that our analyses in this phase of this docket have been more limited than in previous phases and in earlier proceedings addressing facilities needs and options of this and other regions of the world. This result stems from the fact that the USISCs and Comsat did not provide all the information and analyses we requested in the Fourth NOI. Two additional points should be noted before turning to our substantive discussion. First, we will not here address the question of circuit distribution policy for North Atlantic facilities during the 1991-2000 period. Post-1988 circuit distribution policy is being addressed for this region as well as for all other regions of the world in CC Docket No. 87-67. Where the distribution of circuits is relevant to the analysis of the issues we are here considering, we shall use the circuit distributions which the USISCs have submitted in their responses to this docket. Second, as noted in the previous section describing pleadings filed in this proceeding, Comsat now takes the position that it will not oppose the construction of the TAT-9 cable as proposed by the USISCs if we accept the AT&T-Comsat agreement on AT&T's use of Comsat's INTELSAT space segment as consistent with the public interest and rely on that agreement as a basis for withdrawing all loading guidelines for AT&T's IMTS circuits in CC Docket No. 87-67 and if the Comsat tariffs referred to in that agreement become effective. We shall consider the information provided and positions taken by Comsat in its earlier pleadings in this proceeding for two reasons. First, the information and analyses provided by Comsat in its earlier filings is in response to information we requested of Comsat in our Fourth NOI. Second, we have not yet reached a decision in CC Docket No. 87-67.

B. *Traffic Forecasts*

59. The combined USISC's traffic forecast of U.S.-CEPT circuit demand assembled from the USISC's individual responses to the Fourth NOI is set forth in Appendix 1. We also note that we have more recently prepared forecasts of U.S.-CEPT circuit demand for selected years available to us from the NACP. Both the U.S. and CEPT delegations to the November 17-19, 1987 NACWG meeting included forecasts in their respective submissions to that meeting. The following is a comparison of the U.S. and CEPT delegation forecasts with the combined forecast generated from the responses to the Fourth NOI:

NUMBER OF EQUIVALENT VOICE CIRCUITS

FORECAST	**1987**	**1990**	**1995**	**2000**
Fourth NOI **Forecast**[30]	21,486	30,496	57,350	108,599
U.S. 11-87 NACWG **Meeting Forecast**	23,240	36,938	66,295	118,293
CEPT 11-87 NACWG **Meeting Forecast**	22,930	36,454	64,050	107,908

As may be noted, the forecasts submitted by both the CEPT and U.S. delegations to the November 17-19, 1987 NACWG meeting project a larger demand for U.S.-CEPT circuits in 1987, 1990 and 1995 than the earlier forecast submitted in response to our Fourth NOI. The U.S. NACWG forecast also projects a larger demand for U.S.-CEPT circuits in 2000. The CEPT NACWG forecast projects a slightly lower level of demand in 2000. It must be noted, however, as alluded to by Comsat and as set forth in the U.S. Submission to the November 17-19, 1987 NACWG meeting, the forecast contained in that Submission is for the years 1990 and 1995, respectively, 26.3% and 36.6% lower than the USISCs June 1980 forecasts which we considered at the time we were developing the North Atlantic facilities construction and use guidelines for the 1985-1992 portion of the current planning period.

60. As noted earlier, the pleading filed by the DoD on November 17, 1987 has appended to it a projection of the DoD's transoceanic circuit requirements for fiscal years 1988 and 1989. That projection indicates a requirement for 48 1.544 Mb/s, 38 64 kb/s[31] and 2 Alternative Voice-Data (AVD)[32] circuits on U.S.-CEPT routes during fiscal 1988 and 1989. The above digital circuit requirements are the equivalent of 1190 64 kb/s circuits.[33] The DoD also estimates that its wideband digital requirements will quadruple over the next five to ten years. If it is assumed that its U.S.-CEPT requirements increase by the same amount, DoD may require the equivalent of 4760 64 kb/s circuits on U.S.-CEPT routes over the next five to ten years. To put this in perspective, we note that 4760 64 kb/s circuits represents approximately 63 per cent of the 7560 64 kb/s circuit total capacity of TAT-8. However, the DoD pleading does not indicate whether its requirements are for cable or satellite circuits or a combination of both.

61. Because the DoD pleading was filed after the USISCs had filed their forecasts in response to the Fourth NOI and after preparation of the forecast contained in the U.S. Submission to the November 17-19, 1987 NACWG meeting, we do not know whether, or to what extent, the USISCs may have taken the DoD circuit requirement projections reflected in the DoD pleading into account in the preparation of their forecasts. The USISCs and DoD should address the DoD projections and any other recent developments relating to their circuit forecasts in their response to this NPRM.

C. *Demand Flexibility*

62. Demand flexibility is the capability of a transmission facility or a combination of transmission facilities to accommodate unforecasted increases in circuit demand during their useful lives. This capability is a characteristic exhibited by both satellite and submarine cable systems. Both cable and satellite systems have a basic capacity which can be augmented to a maximum capacity by use of additional equipment such as circuit multiplication equipment to derive additional voice paths from basic or bearer circuits used to provide voice services. In the case of satellite systems, the types of modulation and access used with the satellites can also have an effect on a given satellite's overall capacity.

63. A demand flexibility analysis of a given facilities plan is a useful measure of the ability of that plan to provide capacity during the planning period to satisfy unexpected increases in circuit demand above the levels currently forecast. We utilized this approach in our development of facilities construction and use guidelines for North Atlantic facilities during the 1985-1992 portion of the planning period. There we focused on a 20 percent demand flexibility (*i. e.* the ability of a given plan to accommodate a circuit demand 20 percent larger than that forecast) as a reasonable measure of adequate demand flexibility.[34]

64. The Fourth NOI requested Comsat to provide a projection of satellite capacity allocated for U.S.-CEPT service during the 1987-2000 period. Comsat states that INTELSAT does not have definitive or even tentative plans that identify INTELSAT capacity on the level requested through the 1990's, but assumes that approximately 40% of each satellite's capacity is available for North Atlantic service during the planning period. Comsat says it cannot go further without assumptions as to users' plans. However, Comsat was able to estimate North Atlantic satellite capacity in the years 1993 and 1999 because INTELSAT has developed conceptual transponder loading plans for those years. Comsat states that, in 1993, its Plan I would provide between 38,700 and 154,000 voice equivalent circuits over six satellite paths, Plan 2 would provide between 37,900 to 134,800 cicuits over five satellite paths, and Plan 3 would provide between 21,600 to 85,600 circuits over four satellite paths. The lower capacity figure for each of three Comsat Plans is the capacity available if it is assumed that only analog FDMA/FM satellite circuits are provided by satellite. The higher capacity figures assume full use of digital Intermediate Data Rate circuits utilizing digital speech interpolation and 32 kb/s voice-encoding techniques.

65. Comsat asserts that any of its three alternative facilities plans would provide enough INTELSAT satellite capacity to satisfy projected U.S.-CEPT circuit demands through the late 1990's. The USISCs state that, in terms of total capacity, even under Comsat's Plan 3, satellites would provide more than 100 per cent demand flexibility.[35] However, the USISCs also assert that there is a demand for terrestrial digital services which cannot be met by satellite facilities. The USISCs state:

> However, in the current competitive environment, demand flexibility must encompass consideration of customer preferences for emerging digital services as well as quality of service considerations.
>
> Fiber optic technology provides unique capabilities and is not fungible with satellites. Fiber optic cables provide more efficient, virtually error-free secure and interference-free digital services that cannot be duplicated by satellite facilities. For example, digital services which are sensitive to absolute delay and/or monitoring are more suited to transmission over fiber optic submarine cable systems.[36]

The USISCs do not, however, indicate the amount of digital, optical fiber cable capacity they projected will be required to satisfy this demand for terrestrial digital services during the planning period.

66. Our review of the various submissions of the USISCs, Comsat and the other parties to this proceeding has revealed no reason for us to disagree with the USISCs and Comsat that, in terms of total available capacity, the TAT-9 cable is not required, at least in the early portion of the planning period, to maintain adequate demand flexibility. The 21,600 to 85,600 equivalent voice circuits available for U.S.-CEPT services from the INTELSAT satellite system under Comsat's Plan 3 in 1993 and the 36,487 equivalent voice circuits available from TAT-6, TAT-7, CANTAT-2 and TAT-8, after its introduction into service in mid-1988, would appear to provide adequate demand flexibility for a substantial portion of the planning period.

67. We have insufficient information before us to examine whether authorized digital cable facilities (*i. e.* TAT-8) will provide sufficient demand flexibility to meet what the USISCs perceive to be a demand for digital terrestrial services. The USISCs may wish to address the nature of this demand and their projection of the capacity required to satisfy that demand in their responses to this NPRM.

D. *Quality of Service*

68. In response to Appendix A of our NOI, the USISCs and Comsat were required to perform a quality of service analysis for their plans taking into consideration the following factors: (1) diversity (both media and path); (2) redundancy; (3) network-management techniques; (4) the level of service quality after restoration but before repair of the failed facility; (5) the percentage of the circuits used for each service which must be restored pending repair of the failed facility; (6) the restoration capability each plan provides; and (7) the time required to accomplish restoration and the degree to which diversity, redundancy and network management can be considered interchangeable as a means of maintaining service quality.

69. In the USISCs' submission media and path diversity, restoration and network management were identified as critical to the analysis of the service reliability of the USISCs' Plan. Media and path diversity focus on the ability of a particular facility network to recover from the loss of a major facility while minimizing the service impact during the period of the outage. Media diversity permits the facility planner to take advantage of the different characteristics of each transmission medium and also avoid possible systematic problems that might have an impact on all or most service on a single medium. Path diversity is achieved through the use of a number of independent routes to carry traffic to a given country and is one method of maintaining an adequate grade of service if one path fails. The USISCs' analysis shows that their plan enhances media diversity by ensuring the availability of an additional fiber optic submarine cable route in 1991. According to the USISCs' data on media diversity, in 1991, with the introduction of TAT-9, 55% of IMTS traffic would be routed via cable and 45% via satellite. This percentage would remain relatively constant for the duration of the planning period with 56% of IMTS circuits routed via cable in year 2000.

70. As for path diversity, the USISCs note that a natural consequence of adding a new facility is that path diversity will be improved, which permits the facility planner to reduce the percentage of circuits to a particular country that are assigned to each individual route. The USISCs' data shows that with the proposed introduction of TAT-9 in 1991 nine major U.S.-CEPT facility routes will be in operation. The USISCs' data assumes use of the CANTAT-2, TAT-5, TAT-6, TAT-7, TAT-8 and TAT-9 cables in 1991. The satellite facilities assumed are the Primary, Major Path 1 and Major Path 2 INTELSAT satellites. The number of routes would be reduced to 8 by year 2000 due to the retirement of TAT-5.

71. The USISC's submission also relates the effect of improved path diversity on network management and restoration. Network management techniques are designed to optimize the call carrying capacity of a particular network when that network is under stress due to traffic overloads or facility failures. The magnitude of a facility failure is usually expressed as the number or percentage of circuits lost to a particular country at the moment of failure. This number or percentage is, in turn, dependent on the number of diverse paths serving the particular country and the circuit loading strategy. The fewer the number of circuits lost to a particular country as a result of a facility failure, the more effective the network management actions will be in alleviating the service impact.

72. Enhancement of path diversity minimizes the impact of blockage resulting from a failure of the largest facility route to a given point. The USISC Plan was analyzed to determine the percentage of surviving circuits during a failure of the largest route to five countries which represent about 70 percent of the total IMTS circuit demand during the planning period. The countries analyzed were Belgium, France, Germany, the Netherlands and the United Kingdom. According to this analysis, the total percentage of IMTS circuits surviving a failure of the largest route in 1991, after the introduction of TAT-9, ranged from 76% for the Netherlands to 85% for Germany. By year 2000 the percentages ranged from 73% (Belgium and France) to 82% for the United Kingdom and 83% for the Netherlands. Since their plan provides for numerous diverse routes, the USISCs assert that it is flexible from a network management viewpoint because a smaller percentage of circuits to each country is assigned to each individual route.[37] This is substantially greater path diversity than would exist without TAT-9.

73. Restoration refers to the ability to route traffic via alternate facilities in the event of failure of a particular facility. The USISCs note that after a failure, all circuits provided over the failed facility are restored on another facility whenever possible. The USISCs maintain that this practice is more efficient than selective circuit restoration. The time required to implement a restoration plan is directly dependent on the availability of redundant facilities and the complexity of the restoration plan.

74. The USISC's Plan assumes the availability of satellite and earth station capacity which will be capable of providing the necessary restoration capability for use in the North Atlantic during the planning period. However, the USISCs note that the introduction of high-capacity fiber optic cable systems requires the development of a restoration approach that will not be fully dependent on satellite restoration. They assert that this is particularly important for restoration of high speed data transmission which would be seriously affected by the absolute delay inherent in satellite transmission. Specifically, they maintain that, in addition to ensuring integrity of the data and transmission clarity, fiber optic technology is virtually free from bit error rate complications. The USISCs also point out that fiber optic transmission is also much faster than satellite and does not suffer weather and electromagnetic interference. Moreover, they contend that as the loading of TAT-8 increases, reliance on satellite for restoration purposes will become more expensive per circuit than the readily compatible digital restoration capability of TAT-9.

75. Comsat analyzed its plans in terms of path diversity and restoration of TAT-8. Comsat does not anticipate that path diversity will be adversely affected by reducing their deployment of Atlantic Ocean Region satellites to either a five or four satellite configuration. Traffic from satellites that are not replaced under its Plans 2 and 3 would be routed to other satellites. Comsat maintains that there is adequate capacity in the INTELSAT system both to accommodate U.S.-CEPT traffic in excess of that currently projected throughout the planning period and to accommodate the full restoration of the TAT-8 cable system. The capacity cited as available for growth in Comsat's alternative plans is above and beyond the capacity available to restore the TAT-8 cable system.

76. After consideration of the quality of service data provided by the USISCs and Comsat, we tentatively conclude that the proposed introduction of TAT-9 in 1991 would enhance both media and path diversity. On the

other hand, Comsat's Plans 2 and 3 would result in an overall decline in media diversity since fewer satellite circuits would be available to serve the North Atlantic.

77. While the respective merits of each transmission medium is a subject of continuing debate, we observe that fiber optic cable technology may have certain features that might render repeated restoration via satellite facilities undesirable to the user. As noted in paragraph 65, supra, the USISCs state that fiber optic technology provides unique capabilities not fungible with satellites. They note that these capabilities may be important to meet what they perceive as a demand for digital terrestrial services. Thus, while sufficient satellite capacity may be available for restoration of TAT-8 capacity, the absolute reliance on satellite facilities to meet increased demand and restoration needs during the planning period may not be in the best interests of users. Although satellite restoration will be used initially for TAT-8, we believe it reasonable to seek fiber optic restoration alternatives as the amount of traffic routed over this cable increases. Therefore, we tentatively conclude that the proposed introduction of TAT-9 would provide a viable restoration alternative for TAT-8 and other facilities. The total reliance on satellite facilities for restoration of TAT-8 beyond 1991 may prove undesirable to carriers and their users who may have specific communications requirements that may best be accommodated via fiber optic cable facilities.

E. ***Digital Connectivity***

78. The USISCs note that their Plan, *i. e.*, introduction of TAT-9 in 1991, is interrelated with two planned Mediterranean fiber optic submarine digital cable systems, the MAT-2 cable system and the EMOS-1 cable system. The USISCs state that EMOS-1 and MAT-2 were designed in large part to extend traffic from North America and the United Kingdom to the Mediterranean. Thus, they aver that the construction of these systems as presently envisioned is dependent on the availability of TAT-9 in 1991. Together these systems would form an integrated digital network.

79. No party to this proceeding disputes the need for digital connectivity with these Mediterranean systems. Rather, they state that digital connectivity with these systems could be accomplished through use of TAT-8. Specifically, Comsat notes that a Spanish landing point for TAT-8 would obviate the need for TAT-9. Comsat cites the TAT-8 C&MA which includes a provision which would permit modification of the single bident configuration of TAT-8 to a single trident configuration by the addition of a Spanish landing point. The USISCs argue that use of TAT-8 is not viable since the Mediterranean telecommunications community has agreed to a Spanish landing for TAT-9 and prefers the digital connectivity afforded through TAT-9. The USISCs also state that use of TAT-8 to establish digital connectivity would be adverse to Canadian requirements since Canada is a TAT-9 landing point.

80. The increasing importance of the Mediterranean and Middle East to U.S. and world interests clearly warrants the establishment of high quality communications facilities within the Mediterranean region. The introduction of digital fiber optic cables can be expected to enhance the provision of communications in the region, providing users with the benefits of new fiber optic technology. Direct connectivity with these systems from the North American continent will establish an integrated digital network and provide users with a wider range of service alternatives between North America and the Mediterranean. Therefore, we tentatively conclude that the public interest will be served by direct digital connectivity with the EMOS-1 and MAT-2 cable systems. Although the TAT-8 C&MA leaves open the potential that this connectivity could be provided by TAT-8, it is clear that the Mediterranean owners of EMOS-1 and MAT-2 are unanimous in their desire to use TAT-9 and its Spanish landing point to accomplish this. In addition, DoD states that it has special operational requirements which it indicates may be provided via the digital connectivity between TAT-9 and the Mediterranean fiber cables planned for 1991 activation. In light of these considerations, we tentatively conclude that the establishment of digital connectivity with the EMOS-1 and MAT-2 cables via TAT-9 will serve the public interest. However, we do request further comment on the need to obtain this connectivity via TAT-9 rather than through a TAT-8 spur.

F. ***Costs***

81. Two types of cost information were requested in the Fourth NOI. Appendix A requested the USISCs and Comsat to, *inter alia*, estimate the respective original capital costs of cable and satellite facilities that could be made available for North Atlantic service during the planning period. Appendix B requested the USISCs and Comsat to provide the estimated total costs for each alternative plan submitted.

82. In response to Appendix A, the USISCs state that, based on 1987 price levels, the cost of the TAT-9 system, employing three European landing points and two North American landing points, is estimated to be $400 million, excluding land and building. The USISCs project the land and building expense of TAT-9 to be $5 million. The $400 million is composed of the following cost elements: 1) cable - $125.4 million; 2) repeaters -$108.1 million; 3) engineering, burying and laying - $33 million; 4) terminals - $73.5 million; and 5) branching multiplexer - $60.0 million. In addition, interest during construction for the USISCs is estimated at $48 million or 14 percent of the USISCs' investment.[38] The USISCs will have a joint ownership share of 40.2 percent in the cable itself (excluding cable stations) and will be responsible for that portion of the costs allocable to their respective ownership shares.

83. In response to Appendix A, Comsat provided the original capital costs of all spacecraft, existing and planned, expected to be in operation during the planning period. Since the INTELSAT V, VA and VI satellites have already been authorized, only the FOS satellites would involve additional capital costs during the planning period. Comsat estimates INTELSAT's total system cost for FOS to be $1,294 million. Comsat's share of this cost depends on its investment share in INTELSAT, currently estimated to be 25.6%.

84. The USISCs cost analysis submitted in response to Appendix B employs the use-related cost methodology which examines and quantifies the expenditures that the USISCs will incur over the planning period. These costs include investment costs for new cable facilities and capital additions to existing cable and earth station facilities, operating and maintenance costs for facilities owned by service carriers, lease costs to obtain INTELSAT space segment and IRU capital and operating and maintenance costs for transit facilities as well as lease charges for transit facilities not owned by the carriers. The USISCs believe

that the use-related method is the most appropriate means of analyzing their plan because it identifies the actual costs that will be incurred to provide their services and which will be included in developing their service charges. The analysis includes costs of TAT-9 incurred before the planning period and costs resulting from anticipated modifications and alterations to facilities already in service prior to the planning period.

85. The USISC's costs were displayed separately for cable and satellite facilities and included total expenditures for each year. The total expenditures are then converted to discounted present worth (*i. e.* January 1987 dollars). The USISCs estimate that their total use-related cable costs incurred during the planning period to be $440 million.[39] Total use-related satellite costs are estimated at $990.9 million. Thus, the USISC's combined use-related cable and satellite costs totals $1,430.9 million.

86. Comsat's response to Appendix B did not provide information in the level of detail requested by the Fourth NOI. Specifically, Comsat did not estimate total cost of its alternative plans. Comsat's analysis dealt only with the costs of FOS but omitted operating and maintenance costs and launch costs for the INTELSAT V and VI programs. Under Plan I, INTELSAT's cost for FOS would be $1,355.4 million, and Comsat's cost $347.4 million. INTELSAT's and Comsat's costs for Plan 2 would be $1,148.5 million and $294.4 million, respectively. Plan 3 would cost INTELSAT $938.6 million and Comsat $240.6 million.

87. Based on our consideration of the cost data submitted by Comsat and the USISCs, we cannot reach any definitive conclusions with respect to the relative costs of each plan. Indeed we find that the information provided by the USISCs and Comsat does not permit any of them to perform the type of cost analysis requested by our Fourth NOI. Comsat properly observes that it cannot perform the type of analysis contemplated by the Fourth NOI without knowledge of the detailed circuit distributions proposed by the USISCs. The USISCs filing such distributions requested that they be held confidential. The USISCs properly observe that Comsat did not provide all of the cost information requested by the Fourth NOI. As the USISCs point out, Comsat did not provide the costs requested according to the year expended as directed by the Fourth NOI. No operating and maintenance costs for existing satellite series were provided. No estimates of the costs of launch insurance were included. Costs for the launch of INTELSAT VI series satellites which will occur during the planning period were not provided.

88. We request that Comsat provide the information requested by our Fourth NOI in its response to this NPRM. We further request that Comsat update its cost information to reflect the latest information available from INTELSAT regarding follow-on-satellites. We request the USISCs to provide, in their response to this NPRM, cost analyses on an investment basis as requested by the Fourth NOI[40] for their Plan and the three Comsat Plans. We also authorize the staff to request any additional information which may be found necessary to produce these cost analyses.

89. We are, however, able to make some comparisons with respect to the capital costs of a basic voice-grade half-circuit in the TAT-8 and TAT-9 cables. The capital cost for a basic voice-grade TAT-9 half-circuit will be approximately $15,000 or approximately 37.5 percent less than that of TAT-8 ($24,000). Thus, TAT-9 will offer additional fiber optic cable capacity at significantly lower costs than TAT-8.

G. *Portugal Landing Point*

90. In the NOI we noted that Portugal had publicly expressed desire in participating as a landing point for TAT-9. We invited comments on whether Portugal should be invited to join as the sixth landing point country from the standpoint of technical feasibility, cost differentials and other relevant factors. The USISCs state that the TAT-9 owners discussed the possibility, but the European parties could not agree to include two Iberian landing points in the TAT-9 configuration. Since a southern Spain landing is considered critical for digital connectivity with the MAT-2 and EMOS-1 cable systems, the USISCs argue that a Portugal landing is not feasible.

91. The Embassy of Portugal submitted a memorandum supporting Portugal landing point. The memorandum stated that a Portugal landing point would result in the following advantages: 1) increased diversity and flexibility in the routing of U.S. traffic to (existing and proposed) cable systems, landing in Portugal; and 2) a reduction in the overall investment of TAT-9 owners. DoD's comments also support a Portugal landing point because it enhances diversity of the TAT-9 system by providing alternative routing and restoration capabilities to meet its national security emergency preparedness requirements in the North Atlantic region.

92. Although the USISCs state that two Iberian landing points were not deemed feasible by the TAT-9 parties, they did not fully explore other factors related to a Portugal landing point such as technical feasibility and cost differentials. The Embassy of Portugal and DoD both cite the potential benefits of a Portugal landing point which were not addressed by the USISCs. We therefore request further comment on the addition of a Portugal landing point. We expect that any USISCs submission should specifically address the issues raised by the Embassy of Portugal and DoD. We also solicit comment on the desirability and consequences of a Portuguese landing point via the TAT-8 spur.

H. *Competitive Considerations*

93. In the NOI in this proceeding the parties were asked to comment on our open entry policy, our encouragement of intermodal as well as intramodal competition, and our desire to encourage technological developments. As to technological developments, the USISCs note that their TAT-9 plan would provide further technological innovation through: 1) use of wet multiplexing technology; 2) use of 1.5 micron wavelength lasers instead of the 1.3 micron lasers proposed for TAT-8; and 3) increased capacity at 565 Mbs digital transmission per fiber pair.

94. The USISCs also commented on the effect of the alternative plans on our goal to promote a more competitive telecommunications environment. The USISCs cite several Commission decisions which have fostered competition in the international marketplace. They assert that marketplace conditions resulting from our decisions exert strong pressure on their facilities choices and, as a result, carriers must now examine the economic efficiency of their facility investments and judiciously plan their facilities needs.

95. The USISCs state that their plan encourages the further development of intermodal competition, creating continued downward pressure on facilities costs and widended customer choices. They state that Comsat's proposals would inhibit, if not eliminate, intermodal competition by making the USISCs totally dependent upon satellites for additional capacity. The USISCs submit that this would remove any incentive for Comsat to lower its satellite rates or to introduce innovative rate plans to make its services more competitively attractive. Further, they note that Comsat's proposals could also adversely impact the development of services competition by creating a shortage of needed fiber optic cable capacity, which could impede competitive growth, particularly for new carriers trying to enter new markets and for carriers planning to introduce new fiber optic digital services.

96. Comsat's comments, for the most part, focus on the additional ratepayer expense of the TAT-9 cable and the perceived relative lack of demand for a new fiber optic cable in the North Atlantic Region. As noted previously, Comsat argues that there is sufficient capacity available under either of its alternative plans to accommodate growth and to restore the entire capacity of TAT-8. In light of these factors, Comsat believes that the technical innovations of TAT-9 are insufficient to justify the introduction of a new fiber optic cable.

97. We tentatively conclude that introduction of TAT-9 in 1991 will further increase intermodal and intramodal competition. We have previously recognized that enhancing both intermodal and intramodal competition can be expected to spur providers of both international satellite and cable services to keep their services innovative and their prices low.[41] Such innovation also encourages foreign administrations to enter into operating agreements with new service providers. In the current environment intermodal competition spurs innovations in both cable and satellite technology. Although TAT-8 has already been authorized and will provide fiber optic cable technology in the North Atlantic region for the first time, we conclude that its existence alone cannot be relied upon to provide the impetus for further innovation in satellite technology for the remainder of the planning period. As the TAT-9 proposal attests, further technical innovations are constantly occurring, although such innovations clearly do not have the same impact as the initial introduction of fiber optic technology in the region. We believe such further technological advancements and innovations are necessary to provide the public with the most advanced technology while further widening the range of options available to consumers in satisfying their communications needs.

I. ***Evaluation of Plans***

98. Each party was requested to submit an evaluation of the plan[s] it generated, ranking them in order of overall preference. As part of the evaluation, each party was requested to provide reasons underlying a particular preference. In particular, we required that each party discuss differences in costs and the level of service quality represented by each plan and indicate the weight accorded to each.

99. The information provided by both Comsat and the USISCs did not fully comply with our request. Although Comsat submitted three plans, it did not express a preference for any particular plan. Comsat's failure to specify a preference is understandable since no INTELSAT decision has been made on the number of FOS to be deployed in the Atlantic Ocean Region.

100. Although the number of satellites to be deployed varies from six under Plan 1 to five under Plan 2 and four under Plan 3, Comsat states that service reliability will not be adversely affected under any of these plans. Moreover, Comsat notes that there is adequate capacity under each plan to accommodate U.S.-CEPT traffic in excess of that currently projected throughout the planning period and to accommodate the full restoration of TAT-8. Finally, Comsat states that the major technological risk element in the alternative plans is the FOS spacecraft. However, this risk is viewed as minimal since all FOS concepts derive from technologies that are used in either INTELSAT V series spacecraft already in operation or in spacecraft under construction.

101. AT&T did not provide a range of plans and therefore did not fully comply with our requirement that plans be ranked according to particular factors. Although the USISCs state that various options were considered by them and their correspondents, only one plan was submitted. The USISCs submitted that it would be costly, counterproductive and unreasonably burdensome on both the carriers and the Commission for data to be developed on options other than the preferred plan. The USISCs analysis of their plan is included under the quality of service and costs sections of this discussion.

J. ***Correspondent Acceptance***

102. We have long recognized that the degree of correspondent acceptance is an important factor in considering various facility alternatives. The TAT-9 cable was reviewed at the NACWG meeting in Quebec in May 1986, at the North Atlantic Consultative Process - Senior Level Meetings in San Francisco in September 1986 and at the NACWG meeting in Rome in November 1987. The TAT-9 C&MA was signed by 25 parties on March 18, 1987 in Madrid, Spain and, on the same date, the MAT-2 C&MA was also signed. The ready for service date of MAT-2 (July, 1990) is planned, according to the MAT-2 C&MA, so as to precede or coincide with the TAT-9 C&MA ready for service date of October, 1991. The C&MA for EMOS-1 has been initialed by all parties. Based on the data submitted in response to our NOI, it is clear that the USISCs Plan has the approval of CEPT foreign correspondents. And, in light of the interrelationship between TAT-9 and the planned EMOS-1 and MAT-2 cable systems, it is clear that TAT-9 has the endorsement of Eastern Mediterranean and Near East countries.

103. While the need for and timing of future facilities are not decided solely on the needs and desires of our foreign correspondents, international comity remains an important factor in our decision-making process. Thus, we tentatively conclude that the USISC plan is preferred from the standpoint of correspondent acceptance and that the TAT-9, MAT-2 and EMOS-1 cable facilities should be fully coordinated.

K. ***Other Issues***

104. PanAmSat and PTAT have requested that their private, non-common carrier facilities be considered in developing policies and guidelines concerning the need for additional telecommunications facilities in the North Atlantic during the planning period. Specifically, PTAT

urges that we acknowledge the introduction of its privately-owned cables and consider the impact of these facilities on the need for and timing of TAT-9. PanAmSat asserts that the USISCs have not adequately taken into account the availability of non-INTELSAT space segment in developing their forecasts for the next decade, in particular the restoration capacity of such systems.

105. Based on the facts underlying the authorization of the PTAT and PanAmSat systems, we tentatively conclude that there is no present basis to consider private facilities in the context of the North Atlantic Planning Process at this time. The fundamental thrust of our authorization of private systems was to spur both intermodal and intramodal competition. Indeed, we envisioned that these private systems would compete with common carrier facilities. In considering applications for cable landing licenses for private cables to serve the North Atlantic Region, we concluded that private systems in which bulk transmission capacity would be sold or leased on a non-common carrier basis would enhance both intermodal and intramodal competition in the provision of North Atlantic transmission capacity, and that the increased competition would provide various user benefits and further stimulate technology and service development to the benefit of international users.[42] However, we recognized that these private systems were risk ventures and that use of these systems by common carriers could not be guaranteed. Although we recognized the possibility to provide capacity to common carriers, we noted that any carrier desiring to use the facilities must seek Section 214 authority, and to the extent U.S. carriers seek to use the proposed facilities, any capacity so employed could be considered in the NACP or the North Atlantic Planning Process.[43] Since none of the USISCs had indicated its intention to use the proposed facilities and absent any specific information as to the extent of such use, we did not consider the facilities relationship to the NACP.[44] To date, only one carrier, Allnet, has applied to acquire capacity in the PTAT cable. In authorizing Allnet's request, the Bureau noted that Allnet's proposed acquisition of a very limited number of circuits will not impair service to the public.[45] The Bureau further determined that Allnet's use of PTAT should not be considered in the context of CC Docket No. 79-184 since its request involves only a miniscule number of circuits in comparison to the number of circuits on existing facilities and planned for new facilities in the North Atlantic.

106. In light of the limited use of PTAT facilities proposed by U.S. carriers, we conclude that there is no present basis for considering the availability of PTAT's facilities in the context of the North Atlantic Planning Process. There is not sufficient evidence at this time of planned common carrier use or the extent of such use to warrant consideration of PTAT's facilities in the context of the North Atlantic Planning Process. In the absence of such evidence, we believe that PTAT's facilities should be viewed in light of its original purpose of providing bulk transmission capacity to private users, and continue to function outside of the North Atlantic Planning Process.

107. We also conclude that there is no basis for consideration of PanAmSat's satellite facilities in the context of the North Atlantic Planning Process at this time. PanAmSat's request to use the six K-band transponders for U.S.-Europe service is currently under consideration. Even if it had such authorization, PanAmSat would have to have the agreement of a European country to use its satellite and then complete the INTELSAT Article XIV(d) consultation process. Assuming PanAmSat's success in satisfying the above requirements, use of its system is limited to restoration services or providing telecommunications not interconnected to the public switched network.[46] Thus, its system would not be eligible to carry the bulk of the common carrier services provided in the North Atlantic. In light of the limitation on the use of PanAmSat's system, we conclude that there is no basis for consideration of its system in the context of the North Atlantic Planning Process at this time.

108. The TAT-9 C&MA, in addressing the construction of the main submarine cable (Segment F) that links the interfaces of the five landing point countries, states that supply contracts will be designated by the Procurement Group (AT&T, British Telecom, DGTF and Teleglobe), subject to authorization by the TAT-9 General Committee. We note that past fiber optic cables such as TAT-8 and TRANSPAC-3 were finally authorized based in substantial part on these facilities being built principally by U.S. firms. We therefore request the USISCs to provide more specific data as to the allocation of the various segment and subsegment construction contracts. We are also concerned about the ownership of excess cable capacity, particularly on the U.S. end. We therefore request a more complete description of the pooling arrangement, as well as its financial workings, for the ownership of spare/excess capacity.

VII. SUMMARY

109. In this NPRM, we seek to develop policies and guidelines to be followed in the authorization of common carrier facilities to meet the telecommunications needs of the North Atlantic Region during the 1991-2000 period. We tentatively conclude that while sufficient demand flexibility exists to accomodate USISCs traffic demand for a major portion of the planning period, it is not clear whether DoD's rather substantial estimate of circuit requirements was included in the USISCs forecast. In addition, the USISCs note the importance of the unique capabilities of fiber optic technology in meeting a perceived demand for digital terrestrial services. We invite further comment on DoD's circuit projections and the degree to which planned fiber optic cable facilities will be sufficient to meet the demand for digital terrestrial services.

110. Despite the uncertainty as to demand flexibility,we consider other factors in arriving at our tentative conclusion that introduction of TAT-9 in 1991 will serve the public interest. Specifically, we note that introduction of digital, fiber optic cable will: 1) provide restoration of the optical fiber TAT-8 cable and other facilities while increasing both media and path diversity; 2) provide digital connectivity with the MAT-2 and EMOS-1 cable systems resulting in an integrated digital network between North America and the Mediterranean; 3) promote national security interests by satisfying the operational requirements of DoD in the Atlantic and Mediterranean regions; 4) provide further technological innovations which should provide users with the widest range of technological alternatives in meeting their specific service requirements; 5) further enhance intermodal and intramodal competition; and 6) satisfy our objective of promoting international comity.

111. In light of these benefits, we tentatively conclude that introduction of TAT-9 as early as 1991 will best serve the public interest in meeting the telecommunications needs of the North Atlantic during the 1991-2000 time period. However, we reach no tentative conclusion as to the ultimate design of TAT-9 in light of comments on the record regarding the potential benefits of adding Portugal as a sixth landing point country. We request further comment on this issue. We also request parties to provide information concerning the contract award for construction the TAT-9 cable. We further request parties to address the issue of the ownership of excess cable capacity, particularly on the U.S. end. We also find that we have insufficient information on the INTELSAT FOS to reach any tentative conclusions on the number and type of FOS to be deployed. We conclude that specifics of FOS can be addressed in our normal instructional and application processes. We do not reach any conclusions on loading methodology since that issue is being considered in CC Docket No. 87-67. Finally, we conclude that there is no basis for considering the availability of private, non-common carrier facilities in the context of the North Atlantic planning process at this time.

ORDERING CLAUSES

112. Accordingly, pursuant to Sections 4(i), 4(j), 214 and 403 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 154(j), 214 and 403 (1976) and Section 201(c) of the Communications Satellite Act of 1962, as amended, 47 U.S.C. Section 721(c) (1976), IT IS ORDERED that a Rule Making is hereby INSTITUTED into the above described issues.

113. IT IS FURTHER ORDERED that American Telephone and Telegraph Company, the Communications Satellite Corporation, FTC Communication, Inc., ITT World Communications, Inc., MCI International, Inc., RCA Global Communications, Inc., TRT Telecommunications Corporation, US Sprint Communications Company and Western Union Telegraph Company are made parties respondent to the Rule Making initiated herein.

114. IT IS FURTHER ORDERED, pursuant to applicable procedures set forth in Sections 1.411, 1.412, 1.415, 1.419 and 1.421 of the Commission's Rules and Regulations, 47 C.F.R. Sections 1.411, 1.412, 1.415, 1.419 and 1.421 (1986), that, all parties shall and other interested persons may file comments on the issues in this proceeding 30 days from the release date of this item, and that reply comments will be due 45 days from the item's release date. Before final action is taken in this proceeding we shall consider all relevant and timely comments filed. In reaching a decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in the Report and Order.

115. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206 (a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202 (f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

116. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202 (b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

117. Pursuant to Section 650(b) of the Regulatory Flexibility Act (P.L. 96-354), IT IS CERTIFIED, that Sections 603 and 604 of that Act do not apply because these rule changes will not, if promulgated, have a significant economic impact on a substantial number of small entities. *See* 5 U.S.C. 603, 604, 605(b) (1976). In addition, the Regulatory Flexibility Act does not apply to this proceeding because that Act excludes from its application all proceedings such as this that involve "a rule of particular applicability relating to rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services, or allowances thereof or to valuations, costs or accounting practices relating to such rates, wages, structures, prices, appliances, services, or allowances." 5 U.S.C. Section 601(2).

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

APPENDIX 1

USISCs U.S.-CEPT CIRCUIT FORECAST (MAY 1987)

	IMTS	non-IMTS	Total	IBS(64 Kbps)
1987	19157	2329	21486	657
1988	21626	2752	24378	963
1989	24045	3139	27184	1175
1990	26959	3537	30496	1360
1991	30007	4054	34141	1558

1992	34232	4538	38770	1657
1993	39187	5051	44238	1739
1994	44813	5590	50403	1815
1995	51204	6146	57350	1911
1996	58419	6736	65155	2000
1997	66604	7424	74028	2087
1998	75869	8175	84044	2153
1999	86749	8960	95709	2271
2000	98767	9832	108599	2401

USISCs: AT&T, FTCC, HTC, ITT, MCII, RCA, TRT, US Sprint, WU.

FOOTNOTES

[1] The USISCs are the United States common carrier entities which provide international telecommunications services directly to the public. The USISCs who have filed joint comments and responses in this proceeding are: the American Telephone and Telegraph Company (AT&T); FTC Communications, Inc. (FTCC); ITT World Communications Inc. (ITT Worldcom); MCI International, Inc. (MCII); RCA Global Communications, Inc. (RCA Globcom); TRT Telecommunications, Inc. (TRT); US Sprint Communications Company (US Sprint); and The Western Union Telegraph Company (WUTCO).

[2] As used in this proceeding, the term North Atlantic Region refers primarily to the traffic relations between the United States and European countries which are members of the European Conference of Postal and Telecommunications Administrations (CEPT). However, the term also encompasses traffic relations between the United States and non-CEPT countries served by North Atlantic cables. The term is not coextensive with the term "Atlantic Region" used in the context of the INTELSAT global satellite system.

[3] Policies for Common Carrier Facilities in the North Atlantic Region, 2 FCC Rcd 2088 (1987).

[4] Two ad hoc meetings were held in 1971 among representatives of the telecommunications entities of Canada, the CEPT countries, the Commission, the Department of State (DoS), the Office of Telecommunications Policy (now the National Telecommunications and Information Administration (NTIA) of the Department of Commerce), the USISCs and Comsat to discuss differing views on the Commission's TAT-5 proportional fill circuit distribution policy and on its actions in Docket No. 18875 pertaining to facilities planning for the 1970-1979 period. At a meeting convened in Munich, Federal Republic of Germany in October 1974, it was agreed that there should be a series of irregularly scheduled meetings among these entities for the exchange of information and policy views bearing on facilities planning issues of common interest. These meetings have come to be known as the North Atlantic Consultative Process and continue to be held.

[5] Policies of Overseas Common Carriers, 73 FCC 2d 193 (1979). This NOI was followed by the release of a Second NOI on April 3, 1980, Policies for Overseas Common Carriers, 76 FCC 2d 522 (1980), and a NPRM released November 7, 1980, Policies for Overseas Common Carriers, 82 FCC 2d 407 (1980).

[6] Policies for Overseas Common Carriers, 84 FCC 2d 760 (1981).

[7] On August 22, 1985, we released a Second Report and Order in this docket setting forth guidelines for the distribution of circuits among available North Atlantic facilities during the 1986-1988 period. *See* North Atlantic Telecommunications, 101 FCC 2d 1259 (1985). *See also* Third NOI, North Atlantic Telecommunications, FCC 84-351, (released August 3, 1984) and Second NPRM, North Atlantic Telecommunications, 100 FCC 2d 1405 (1985). Post-1988 circuit distribution policy for the North Atlantic region, as well as for all other regions of the world, is currently being considered in CC Docket No. 87-67. *See* Post-1988 Circuit Distribution Policy, 2 FCC Rcd 2109 (1987).

[8] We addressed the question of the configuration of the TAT-8 digital, optical fiber cable system in our decision authorizing the USISCs to participate in the construction and operation of that facility. *See* AT&T Co., 98 FCC 2d 440 (1984).

[9] Policies for Common Carrier Facilities in the North Atlantic, 2 FCC Rcd 2088 (1987).

[10] During preparation of the U.S. Submission to the May 28-30, 1986 North Atlantic Consultative Working Group (NACWG) meeting, AT&T disclosed that a TAT-9 cable ready for service as early as 1991 was under consideration. At the May 28-30, 1986 NACWG meeting, it was disclosed that AT&T, Teleglobe Canada (Teleglobe), British Telecommunications plc (BT), Secretariat D'Etat aux Postes et Telecommunications, Republic of France (FPTT) and Compania Telefonica Nacional De Espana (Telefonica) had signed on May 21, 1986 an "Agreement to Plan and Implement TAT-9" which contemplated the construction of a digital, optical fiber TAT-9 cable system ready for service as early as 1991.

[11] Regulatory Policies and International Telecommunications, 2 FCC Rcd 1022 (1987).

[12] The Fourth NOI divided the questions requesting planning information into Appendicies A and B with different dates specified for the filing of responses.

[13] The USISCs filing jointly with AT&T are FTCC, ITT Worldcom, MCII, RCA Globcom, TRT, US Sprint and WUTCO.

[14] We grant the requests and accept these forecasts for consideration.

[15] The U.S. Submission to the November 17-19, 1987 North Atlantic Consultative Working Group (NACWG) meeting indicates that the UBM is a new technology which will enable the TAT-9 cable system to interchange traffic groups of 140 Mb/s and/or 45 Mb/s between its traffic paths, and also provide a line signal bypass facility. The UBMs will be capable of providing the necessary mechanical, optical and electrical interfaces between the TAT-9 branches and trunk.

[16] The TAT-9 C&MA indicates that the eastern UBM will also provide a connection between the United Kingdom and Spain branches of TAT-9 to carry traffic between those two countries and points reached via those two countries.

[17] The U.S. Submission to the November 17-19, 1987 NACWG meeting indicates that the proposed TAT-9 cable system will provide 15,120 Minimum Assignable Units of Ownership (MAOUs). The TAT-9 C&MA indicates that a MAOU will consist of a 64 usable kb/s plus an additional 9.684656 kb/s required for multiplexing. Hereinafter in the Fourth NPRM, we shall use the terms MAOU or 64 kb/s circuit interchangeably when referring to digital cable circuits. TAT-8 will provide 7,560 MAOUS.

[18] The USISCs also note that MAT-2 will in turn provide digital connectivity with EMOS-1, a fiber optic cable system for the Eastern Mediterranean linking Italy, Greece, Turkey and Israel which is scheduled to commence service in 1990.

[19] No data on the follow-on cable system was included in their responses to Appendix A, because no information on cost, capacity, configuration, technology or timing is yet available.

[20] The USISCs later amended their estimate of interest during construction to $48 million.

[21] Due to the potential oversupply of C-band transponders, lack of sufficient K-band transponders and inefficient use of K/C-band and K/K-band connectivities, FOS-Cs would not likely be used in "rim" locations.

[22] In support of this position, the carriers cite the *Tel - Optik Order*, Memorandum Opinion and Order, File Nos. I-S-C-L-84-002 and I-S-C-L-84-003, FCC 85-99 at p. 19, n.25, (released April 5, 1987).

[23] AT&T, FTCC, ITT, MCII, RCAG, TRT, US Sprint and WUTCO.

[24] USISC Joint Response at 4. Although France and Germany did not sign at that time, both administrations signed the C&MA in July, 1987.

[25] *Id.* at 5.

[26] *Id.*

[27] The USISC Response includes AT&T's circuit distribution and facilities forecasts for 1987 through 2000, and AT&T's and ITT's restoration capacity forecasts for 1988 through 2000.

[28] The carriers also question the degree of certainty with which Comsat can forecast multiple satellite launches and the availability of launch vehicles.

[29] The DoS, NTIA and we provide instructions to Comsat pertaining to its participation in INTELSAT Board of Governors meetings where decisions of the procurement of INTELSAT satellites are taken.

[30] These totals exclude the IBS circuits forecast by the USISCs.

[31] The DoD projection seems to indicate that these circuits may be 50,56 or 64 kb/s circuits.

[32] We have assumed that the two AVD circuits are analog circuits.

[33] For the purpose of expressing 1.544 Mb/s circuits in terms of 64 k/bs circuits, it was assumed that one 1.544 Mb/s circuit equaled 24 64 kb/s circuits.

[34] *See* Policies for Overseas Common Carriers, 82 FCC 2d at pp. 435-444. *See also* Policies for Overseas Common Carriers, 84 FCC 2d at pp. 766-769.

[35] At page 8 of their June 19, 1987 joint comments on Comsat's Appendix B submission, the USISCs state:

> Indeed, Comsat's projected capacity is 100 per cent in excess of even the most optimistic demand forecasts by the U.S. carriers and their foreign correspondents.*

* Even Comsat's Plan 3 provides more excess satellite capacity than the total capacity of TAT-9.

[36] *Id.*

[37] AT&T's analysis of total IMTS circuits surviving a failure of the largest facility route to a given point is based on its preferred loading methodology. We are developing circuit loading policy in CC Docket No. 87-67.

[38] The USISCs had originally projected the cost of interest during construction to be $56 million.

[39] The $440 million estimate of USISCs use-related cable costs incurred during the planning period includes: (1) the investment costs of TAT-9 and circuit multiplication equipment for TAT-8 and TAT-9; (2) expenses associated with the operation and maintenance of all cable facilities that will be available during the planning period; and (3) transit charges for the use of facilities to extend traffic carried over cable facilities beyond a cable's landing point to the ultimate destination.

[40] In past phases of this docket and in other planning proceedings, the USISCs have provided both an investment related cost analysis and a use related analysis. They may provide a use related cost analysis for the three Comsat Plans in addition to providing the investment related analysis for the USISC plan and the three Comsat Plans that we require.

[41] Authorized Entities and Authorized Users, 4 FCC 2d 421 (1966), recon. granted in part, 6 FCC 2d 593 (1967) (Authorized User I). In 1982, we modified the Authorized User I decision to permit Comsat to provide space segment capacity directly to users and offer end-to-end services through a separate subsidiary, Authorized User Policy, 90 FCC 2d 1394 (1982) (Authorized User II). However, that decision was vacated and remanded by the court, ITTWC v. FCC, 725 F. 2d 732 (D.C. Cir. 1984). After further proceedings mandated by the court, we essentially readopted our Authorized User II Policy in Comsat, 100 FCC 2d 177 (1985) (Authorized User III). This decision was affirmed by the court upon appeal, Western Union International v. FCC, 804 F. 2d 1280 (D.C. Cir. 1986).

[42] Tel Optik Limited, 100 FCC 2d 1033, 1041 (1985).

[43] Tel Optik Limited, 100 FCC 2d 1033, 1049 (1985).

[44] Tel Optik Limited, 100 FCC 2d 1033 (1985).

[45] Allnet Communication Services, Inc., 2 FCC Rcd 6633 (1987).

[46] Establishment of Satellite Systems Providing International Communications, 101 FCC 2d 1046 (1985); *recon.* 61 RR 2d 649 (1986); *further* recon. 1 FCC Rcd 439 (1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaints of

MARK BROWN 8330-Z
C5-727

against

RADIO STATIONS
WBZ and WRKO
Boston, Massachusetts

ORDER

Adopted: January 29, 1988; Released: February 19, 1988

By the Commission:

1. The Commission has before it an application for review filed by Mark Brown on May 19, 1987. Mr. Brown seeks review of that portion of the Mass Media Bureau's March 20, 1987, ruling which denied his Fairness Doctrine and personal attack complaints against radio stations WRKO and WBZ, Boston, Massachusetts. A copy of the Bureau's ruling is attached.

2. After a careful review of the complaint, we believe that the Bureau's ruling was correct, and that the application for review does not contain sufficient grounds to warrant reversal or modification.

3. Therefore, pursuant to Section 1.115(g) of the Commission's rules, the application for review IS DENIED.[1]

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feater, III
Secretary

ATTACHMENT

8330-Z
C1-41

March 20, 1987

Mr. Mark Brown
P. O. Box 1234
Burlington, Massachusetts 01803

Dear Mr. Brown:

This is in response to your personal attack complaints against radio stations WRKO and WBZ, Boston, Massachusetts, and your Fairness Doctrine complaints against those two stations and WHDH, Boston, Massachusetts, received in this office on January 6, 1987. At your request, we had previously sent you information on the Fairness Doctrine and the personal attack rule.

With respect to your personal attack complaint against WRKO, you allege that during an October 27, 1986, broadcast, talk show host Gene Burns called you a "liar." WRKO, in a response to your initial letter, stated that the personal attack rule was inapplicable since neither you nor any other callers were identified on the air. Thereafter, you requested that WRKO air a retraction of the alleged attack and explain why the station refuses to allow your calls to be aired. WRKO apparently did not respond to this request. Similarly, in your personal attack complaint against WBZ, you allege that talk show host Peter Mead called you a "liar" on at least two occasions. Group W, licensee of WBZ, responded to your letter to the station, stating that, having listened to a tape of the conversation between you and Mead, you were not identified by name at any time during the broadcast. Group W apparently did not respond to your further request for a tape of the broadcast and a public retraction of the alleged statement.

In your Fairness Doctrine complaints against WRKO, WHDH, and WBZ, you contend that each station has engaged in "political censorship" by refusing to allow discussion of two subject matters: "(a) payola -- radio and television bribery and corruption; and (b) criticism of consumer ripoffs at automobile dealers." You contend that payola is a controversial issue of public importance, because it has been covered by various media, and that the owner of a large record store chain was recently indicted in connection with payola charges. You also contend that "criticism of consumer ripoffs by automobile dealers" is a controversial issue of public importance because the Massachusetts Attorney General has stated that 60% of complaints filed with his office involve automobile dealers.

We will first address your personal attack allegations. The personal attack rule (47 C.F.R. Section 73.1920) provides that if a station broadcasts an attack upon the honesty, character, integrity or like personal qualities of an *identified* person or group *during* the presentation of views on a controversial issue of public importance, the station must notify the person or group attacked, send a transcript or an accurate summary of the broadcast, and afford an opportunity for response. In neither of your complaints have you shown that the alleged attack was made during the presentation of views on a controversial issue of public importance, nor have you even identified the specific issue

under discussion. You have also failed to show that either of the broadcasters was unreasonable in determining that you were not identified during the broadcasts. Thus, in two key respects, you have failed to provide the elements of a *prima facie* personal attack complaint. Thus, no Commission action is warranted in this matter.

With respect to your charges of "political censorship" in the context of your Fairness Doctrine complaints, the Commission is prohibited by the Communications Act from directing broadcasters in the selection or presentation of specific programs. Thus, with certain statutory exceptions such as "equal time" for political candidates, each broadcaster is free to carry or reject any program it chooses. The Fairness Doctrine, however, imposes two obligations on broadcasters. The first, which your complaint apparently addresses, is to inform the public by broadcasting discussions of controversial issues of public importance. The second is to provide a reasonable opportunity for the presentation of significant contrasting views on such issues. Broadcasters have the widest discretion to select what issues they will or will not cover. Indeed, inquiry by the Commission in such matters is rare, as the Commission does not expect broadcasters to cover each and every important issue that may arise in their communities. *Fairness Report*, *supra*, at 10. Once a broadcaster decides to cover a particular issue, it has similar discretion to determine how to present the issue, including what person or group should present a viewpoint on the issue. The Commission has stated that only in the rarest of instances where a licensee has failed to give any coverage to an issue found to be of particularly *critical* importance to its community would questions be raised as to whether a licensee has fulfilled its fairness obligations. *Brent Buell*, 97 FCC 2d 55, 57 (1984).[2] You have not shown that these are such instances.

Based on the above, we cannot conclude that stations WRKO, WBZ, and WHDH failed in their fairness obligations to cover issues of critical importance to the community at large. Accordingly, no further action is warranted on this aspect of your complaint.

In view of the foregoing, your complaints ARE DENIED.

Sincerely,

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

FOOTNOTES

[1] During the pendency of this matter, in an action taken on August 4, 1987, pursuant to a remand by the United States Court of Appeals for the District of Columbia Circuit in *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987), the Commission found "that the Constitution bars [the Commission] from enforcing the Fairness Doctrine . . " *Syracuse Peace Council v. WTVH*, 2 FCC Rcd. 5043 (1987). That decision did not, however, consider the application of the Fairness Doctrine in contexts involving the personal attack rule. *Id.* at 5063 n.75. Because we find that the staff appropriately denied the complaint on the merits, we need not decide the ramifications of Syracuse Peace Council in the context of a personal attack issue.

[2] One such instance occurred in Patsy Mink, 59 FCC 2d 987 (1976), in which complainants submitted substantial evidxence to show that "strip mining" was a controversial issue of public importance, as it invoked local and national debate, and had a uniquely significant impact on the economic and physical well-being of the citizens of Clarksburg, West Virginia.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-53

In re Applications of

ROSCOE CLIFFORD BURWELL, JR. (hereafter Burwell) — File No. BPH-861125MB

Maxine Moore d/b/a NFP BROADCASTING CO. (hereafter Moore) — File No. BPH-861126MK

WILLIAM C. MONROE (hereafter Monroe) — File No. BPH-861126MM

For Construction Permit for
New FM Station, Channel 294A, 107.7 MHz
North Fort Polk, Louisiana

HEARING DESIGNATION ORDER

Adopted: January 29, 1988; Released: February 19, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Monroe*. On January 22, 1987, the Federal Aviation Administration determined that the tower specified in Monroe's application "would exceed Part 77 obstruction standards and further aeronautical study is necessary to determine whether it would be a hazard to air navigation. Pending completion of any further study, it is presumed the construction would be a hazard to air navigation." The F.A.A. also stated that "[i]f the proposed structure were reduced in height to not exceed 185 ft. above ground (500 ft. above sea level), it would not exceed Part 77 obstruction standards."

3. In response to the finding by the Federal Aviation Administration, Monroe filed an amendment on February 18, 1987 to increase power from 3.0 kW to 6.3 kW and decrease HAAT from 100 meters to 72 meters. On August 6, 1987, Moore filed a petition to deny this amendment. The amendment proposes facilities well in excess of the maximum allowed for a Class A station pursuant to 47 C.F.R. § 73.211(b)(1). Since acceptance of this amendment would have resulted in a violation of 47 C.F.R. § 73.211(b)(1) and no waiver request was submitted, the amendment will be returned. *See Golden Shores Broadcasting, Inc.*, 2 FCC Rcd 4763 (1987). Furthermore, in light of the action taken herein, Moore's petition to deny will be dismissed.

4. On January 7, 1988, our Antenna Survey Branch indicated that the FAA has not issued a final airspace determination for Monroe's original tower. Since the Federal Aviation Administration's preliminary finding was that Monroe's original tower would constitute a hazard to air navigation, an issue with respect thereto will be included and the FAA made a party to the proceeding.

5. The FAA has determined that the towers proposed by Burwell and Moore would constitute a hazard to air navigation. As of January 7, 1988, the FAA had not received an appropriate corrective amendment for either applicant. Accordingly, an issue with respect thereto will be specified for these applicants as well.

6. The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
Moore	April 30, 1987; September 21, 1987

7. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

8. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by each of the applicants would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

10. IT IS FURTHER ORDERED, That the February 18, 1987 amendment filed by Monroe IS RETURNED AS UNACCEPTABLE FOR FILING.

11. IT IS FURTHER ORDERED, That the petition to deny filed by Moore on August 6, 1987 IS DISMISSED AS MOOT.

12. IT IS FURTHER ORDERED, That the petition for leave to amend filed by the following applicant IS GRANTED, and the corresponding amendment IS ACCEPTED to the extent indicated herein: Moore.

13. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

14. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than March 11, 1988, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

16. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-54

In re Applications of

LOUDON BROADCASTERS, INC. (hereafter LBI)	File No. BPH-870105MA
JAMES A. GRAVES, JR. (hereafter Graves)	File No. BPH-870107MC
LOUDON COUNTY COMMUNICATIONS, INC. (hereafter LCCI)	File No. BPH-870107MF
LAUDERDALE-McKEEHAN CHRISTIAN BROADCASTING CORP. (hereafter McKeehan)	File No. BPH-870106MD (DISMISSED HEREIN)

For Construction Permit
for a New FM Station
in Loudon, Tennessee on
Channel 256A (99.1 MHz)

HEARING DESIGNATION ORDER

Adopted: January 29, 1988; Released: February 19, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *McKeehan.* In its application, McKeehan has omitted Section II, page 2 of FCC Form 301, which includes in Items 3(a) and 3(b) questions pertaining to 47 U.S.C. § 310(b) (alien ownership) by the applicant.

3. In the *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985), the Commission adopted an FM application processing standard which requires a "hard look" approach as to certain critical elements that are essential to a determination that an application is "substantially complete." This approach benefits the public interest by reducing frivolous and speculative applications and streamlining our processing procedures to make more efficient use of our staff and other resources. Further, in Appendix D to the *Report and Order, supra,* we stated that failure to respond to the question by which certification of compliance with 47 U.S.C. § 310(b) is invited renders the application so fundamentally defective that further processing is unwarranted. Since the alien ownership certification found on page 2 is missing, we conclude that the McKeehan application was inadvertently accepted for tender and for filing and must therefore be dismissed.

4. The applicant below has not submitted a description in narrative form of proposed programming relating to the issues of public concern facing its service area, pursuant to paragraph 1, Section IV, Form 301. Accordingly, the applicant will be required to file within 30 days of the release of this Order a narrative programming statement with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge. *APPLICANT:* LCCI.

5. In response to Section VI of FCC Form 301, LCCI has indicated that it will employ five or more full-time employees. Therefore, LCCI is required to submit the five-point Model Equal Employment Opportunity (EEO) Progam (FCC Form 396A). The guidelines to the Model EEO Program, paragraph IV, instruct the applicant to specify the recruitment sources that the applicant proposes to use in recruiting minority and female employees. LCCI has not provided these specific recruitment sources in its EEO Program. Accordingly, LCCI shall amend its application, within 30 days of the release of this Order, by submitting specific sources of minority and female recruitment to the presiding Administrative Law Judge.

6. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That for the reasons stated in paragraphs 2 and 3 hereinabove, the application of McKeehan IS HEREBY DISMISSED.

10. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicant shall file an amendment with the presiding Administrative Law Judge describing its planned programming service relating to the issues of public concern facing its proposed service area: LCCI.

11. IT IS FURTHER ORDERED, That pursuant to paragraph IV (recruitment) of the applicant's Model EEO Program, LCCI shall file with the presiding Administrative

Law Judge, within 30 days of the release of this Order, data providing the minority and female recruitment sources that it proposes to utilize in filling job vacancies.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than March 11, 1988, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-21

In re Applications of

CARTA CORPORATION (hereafter Carta)	BPH-861230MA
FRESNO FM LIMITED PARTNERSHIP (hereafter Cruz)	BPH-861230MB
DENNIS R. BROSTROM (hereafter Brostrom)	BPH-861230MC
WAYNE P. DECKER (hereafter Decker)	BPH-861230MD
John Marshall Hooker d/b/a JMH BROADCASTING (hereafter JMHB)	BPH-861230ME
CALIFORNIA BROADCASTING COMPANY. INC. (hereafter CBCI)	BPH-861231MB
JOHN EDWARD OSTLUND (hereafter Ostlund)	BPH-861231MD
VALLEY RADIO LTD., A California Limited Partnership (hereafter VRL)	BPH-861231ME
COMMUNITY FIRST BROADCASTERS OF FRESNO (hereafter Community First)	BPH-861231MF
FRESNO FM PARTNERSHIP, LTD. (hereafter Welch)	BPH-861231MG
VALLEY FM BROADCASTERS (hereafter VFB)	BPH-861231MH
LAURA H. NORMAN (hereafter Norman)	BPH-861231MI
PAUL BOWMAN AND COMPANY, INC. (hereafter Bowman)	BPH-861231MJ
Robert Michael Mason, William Owen Mason, & Laura Sue Moch d/b/a 3M BROADCASTING (hereafter 3M)	BPH-861231MK
FRESNO FM PARTNERSHIP, LTD., Limited Partnership (hereafter Jimenez)	BPH-861231MA (DISMISSED) A California
NEW LIFE ENTERPRISES, INC. (hereafter New Life)	BPH-861231MC (DISMISSED)

For a Construction Permit
for a New FM Station on
Channel 257A, Fresno, California

HEARING DESIGNATION ORDER

Adopted: January 27, 1988; Released: February 19, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary matters.* In his application filed December 31, 1986, Jimenez did not include a response to Section VII of FCC Form 301, the local public notice certification. Under the "hard look" doctrine instituted by the Commission in its *Report and Order* in MM Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985), an application must meet *all* of the tenderability requirements which are set forth therein by the close of the relevant filing window. The "hard look" policy has served the public interest by reducing the number of hastily prepared, frivolous and speculative filings received during a period when the Commission is experiencing a large influx of FM applications. It has also streamlined processing procedures to make more efficient use of staff and other resources *See, e.g., Star Signal Corporation*, 1 FCC Rcd 450 (1986); *James C. Rogers, III*, 2 FCC Rcd 5536 (1987). The *Report and Order* provides in Appendix D the critical elements that are essential for staff processing in order to determine that an application is substantially complete. If any one of the elements described therein is missing from an application following the close of the applicable filing window, that application must be returned as not sufficient for tender. Local public notice certification is one such element. Thus, Jimenez's application was not tenderable as filed and was inadvertently accepted for tender and for filing. Accordingly, Jimenez's application must be dismissed.

3. *New Life.* Prior to filing the instant application on December 31, 1987, New Life principals Dan W. Jantz and N. James Patterson, Jr. filed an application for new FM

service on Channel 281A for Woodlake, California (File No. BPH-850503MA). Thereafter, under Docket No. 87-430, the Woodlake, California application was designated for hearing.

4. The predicted 1.0 mV/m contours of New Life's proposals in Fresno and Woodlake present a substantial and prohibited overlap contrary to the Commission's multiple ownership rules. *See Big Wyoming Broadcasting Corp.*, 2 FCC Rcd 3493, 3495 n.10 (1987), *quoting* the *Report and Order* in MM Docket No. 84-750; *see also LNJ Communications*, 2 FCC Rcd 6072, 6073-74 (1987) (Hearing Designation Order). New Life attempted simultaneously to prosecute two applications, both of which could not be granted. Since New Life's instant application was filed on December 31, 1986, during which time its Woodlake, California application was "pending and undecided," New Life's Fresno, California application was inconsistent and expressly prohibited under 47 C.F.R. § 73.3518, and must therefore be dismissed.[1]

5. *City coverage.* Engineering study performed on the applications of Bowman, Community First, Cruz, Norman and Ostlund has revealed that these applicants have proposed 3.16 mV/m (70 dBu) coverage of the area of the principal community in excess of 90%. CBCI has proposed 70 dBu coverage in excess of 80% of the area of the principal community. The Commission staff does not require waiver of 47 C.F.R. § 73.315(a) unless the proposed 70 dBu coverage falls below 80% of the principal community area. *See John R. Hughes*, 50 Fed. Reg. 5679 (Feb. 11, 1985). *See also A. B. C. D. Broadcasting Co.*, 2 FCC Rcd 6551 (1987) (Hearing Designation Order). Consequently, waiver of 47 C.F.R. § 73.315(a) is unnecessary and the acceptability of their respective applications on this basis is not affected.[2]

6. *Environmental Assessment.* Engineering study performed on the applications of Carta, Decker, Ostlund, Community First, Welch, VFB, and 3M has revealed noncompliance with ANSI C95.1-1982 exposure guidelines for human exposure to radiofrequency radiation as outlined in OST Bulletin No. 65 (October 1985). Consequently, we are concerned in this instance that these applicants may have failed to comply with the newly revised environmental criteria set forth in the *Report and Order* in GEN Docket No. 79-163, 51 Fed. Reg. 14999 (Apr. 22, 1986). Under the newly revised rules, applicants must determine whether their proposals would have a significant environmental effect under the criteria set out in the newly added 47 C.F.R. § 1.1307 (Section 1.1307 of the Commission's Rules). If the applications are subject to environmental processing under the Section 1.1307 criteria, the applicants must then submit an Environmental Assesment (EA) containing the information delineated in the newly revised 47 C.F.R. § 1.1311 (Section 1.1311 of the Commission's Rules). Section 1.1307(b) states that an EA must be prepared if the proposed operation would cause exposure of workers or the general public to levels of radiofrequency radiation exceeding specific standards. Since the proposals of the applicants above may have a significant environmental impact as defined by 47 C.F.R. § 1.1307, they are required to submit the environmental impact information described in 47 C.F.R. § 1.1311. Accordingly, Carta, Decker, Ostlund, Community First, Welch, VFB, and 3M will be required to file, within 30 days of the release of this Order, an Environmental Assessment with the presiding Administrative Law Judge.[3] In addition, a copy shall be filed with the Chief, Audio Services Division, who will then proceed regarding this matter in accordance with the provisions of 47 C.F.R. § 1.1308. Accordingly, the comparative phase of the case will be allowed to begin before the environmental phase is completed. *See Golden State Broadcasting Corp.*, 71 FCC 2d 229 (1979), *recon denied sub nom. Old Pueblo Broadcasting Corp.*, 83 FCC 2d 337 (1980).

7. *Site Coordinates.* Carta, Welch and VFB have each indicated that they will co-locate their respective antennas on the existing tower of KFIG-FM, Fresno, California. According to the Commission's data base, the accepted coordinates for this tower are N Latitude 36' 44' 10" and W Longitude 119' 47' 13". However, Carta listed the coordinates of the tower as N Latitude 36' 44' *07* ", W Longitude 119' 47' *10* "; Welch listed the coordinates as N Latitude 36' 44' *07* ", W Longitude 119' 47' *10* "; and VFB listed the coordinates as N Latitude 36' 44' *07* ", W Longitude 119' 47' *10* ". Because the applicants above propose to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in various places in the subject applications, we are able to verify the transmitter location by taking official notice of the site coordinates found in our files for KFIG-FM. Consequently, this discrepancy does not render the subject applications unacceptable in the instant case. Accordingly, Carta, Welch and VFB will be required to amend their applications by submitting corrective amendments to the presiding Administrative Law Judge within 30 days of the release of this Order.

8. *Brostrom.* In the tower sketch to his application as amended February 20, 1987, Brostrom listed the site coordinates as N Latitude 36' 20' 45" and W Longitude 86' 31' 54". Elsewhere in the amendment, at Section V-B, Item 4, and Section V-G, Item 1, the same transmitter site is referenced as being located at N Latitude 36' 46' 47" and W Longitude 119' 47' 37". Further engineering study reveals that the amendment as a whole supports the proposed coordinates of N Latitude 36' 46' 47" and W Longitude 119' 47' 37". This is because these coordinates are consistent with those given in Exhibit E-3, the topographic site map. Consequently, the discrepancy in the tower sketch does not render the amendment unacceptable because we can safely conclude that the proper site coordinates are N Latitude 36' 46' 47" and W Longitude 119' 47' 37". However, Brostrom will be required to submit a corrective amendment to the presiding Administrative Law Judge within 30 days of the release of this Order.

9. *Decker.* Decker has indicated that it will locate its antenna on the existing tower of KYNO-FM, Fresno, California. According to the Commission's database, the accepted value for the overall height above ground of this structure, including obstruction lighting, is 105.76 meters. In Section V-B, Item 9 of his application, Decker indicated that the overall height above ground *without* lighting is 105.76 meters. Elsewhere in his application, in Section V-G, Item 5 and in the tower sketch, Decker consistently utilized the correct value for overall height above ground, including lighting, of 105.76 meters. Because Decker proposes to locate on an existing tower of a Commission licensee, and because specific reference is made to this tower in various places in the application, we are able to verify the correct tower height by the taking official notice of the data in our files for KYNO-FM. Consequently, the discrepancy arising from Decker's listing the tower's overall height above ground with and without lighting as being equal does not render the ap-

plication unacceptable in the instant case. However, Decker will be required to amend his application by submitting corrective data to the presiding Administrative Law Judge within 30 days of the release of this Order.

10. *Cruz*. In Section V-B, Item 6 of its application, Cruz listed the height of its radiation center above ground level (RCAGL) as 91.13 meters. The tower sketch portrayed this data, however, as 94.18 meters RCAGL. Further engineering study revealed that this three-meter discrepancy pertaining to the RCAGL does not affect the acceptability of the application in the instant case. This is because the correct value of 91.13 meters may be derived by subtracting the value for height of ground above mean sea level (AMSL) 92.96 meters, as portrayed in the tower sketch, from the consistent value given for the height of antenna radiation center above mean sea level (RCAMSL) of 184.09 meters. However, for purposes of clarification pursuant to 47 C.F.R. § 73.3514, Cruz will be required to submit an amendment specifying the correct height for antenna radiation center above ground level to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. *Carta*. In its application at Section II, Item 9, Carta responded affirmatively without further elaboration as to whether documents, instruments, contracts or understandings relating to ownership or future ownership rights exist. Furthermore, at Section II, Item 10, Carta responded negatively without further elaboration as to whether such documents, instruments, agreements or understandings for the pledge of its stock provide that voting rights will remain with the applicant in the event of default; that in the event of default, there will be a private or public sale of stock; and that before such exercise of shareholder rights by the purchaser at such sale, prior consent of the Commission pursuant to 47 U.S.C. § 310(d) will be obtained. Because the information sought therein is material to the grantability of its application, Carta will be required to submit an amendment to the presiding Administrative Law Judge, within 30 days of the release of this Order, supplying information fully responsive to Section II, Items 9 and 10. The Administrative Law Judge may then evaluate this information to determine whether an issue should be specified.

12. *Other matters*. In response to Section VI, FCC Form 301, the applicants below have indicated that they will employ five or more full-time employees. Pursuant to 47 C.F.R. § 73.2080(c), each applicant is required to submit an Equal Employment Opportunity (EEO) Program in compliance with the provisions of the rules as set forth in FCC Form 396A, the five-point Model EEO Program. The EEO programs submitted by the following applicants are incomplete or are otherwise deficient in the manner described below. Accordingly, each applicant listed below will be required to file an amended EEO Program with the presiding Administrative Law Judge within 30 days of the release of this Order.

APPLICANTS DEFICIENCIES

Decker Failed to identify specific sources of recruitment specializing in women candidates

JMHB Failed to identify publications it will utilize in attracting women and minority candidates.

13. The applicants below have petitioned for leave to amend their applications on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under 47 C.F.R. § 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
CBCI	October 22, 1987
VRL	June 4, 1987 (Engineering)
3M	September 15, 1987; December 4, 1987

14. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

15. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicant below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

APPLICANT: Bowman.

16. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

17. Accordingly, IT IS ORDERED, That, pursuant to 47 U.S.C. § 309(e), the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. If a final environmental impact statement is issued with respect to Carta, Decker, Ostlund, Community First, Welch, VFB, or 3M, in which it is concluded that any of the proposed facilities are likely to have an adverse effect on the quality of the environment, to determine whether the proposals are consistent with the National Environmental Policy Act, as implemented by Sections 1.1301-1319 of the Commission's Rules.

2. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: Bowman.

3. To determine which of the proposals would, on a comparative basis, best serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

18. IT IS FURTHER ORDERED, That for the reasons set forth in paragraph 2 hereinabove, the application of Jimenez IS HEREBY DISMISSED.

19. IT IS FURTHER ORDERED, That for the reasons set forth in paragraphs 3-4 hereinabove, New Life's application IS HEREBY DISMISSED.

20. IT IS FURTHER ORDERED, That for the reasons set forth in paragraph 5 hereinabove, the petitions to deny filed by JMHB against the applications of Bowman, CBCI, Community First, Cruz, Norman and Ostlund ARE HEREBY DISMISSED AS MOOT.

21. IT IS FURTHER ORDERED, That for the reasons set forth above, the city-grade waiver requests of 47 C.F.R. § 73.315(a) made by Carta, Decker, JMHB, VRL, Community First, Welch, and VFB ARE HEREBY DISMISSED AS MOOT.

22. IT IS FURTHER ORDERED, That, in accordance with paragraph 6 hereinabove, Carta, Decker, Ostlund, Community First, Welch, VFB and 3M shall submit the environmental assessment required by 47 C.F.R. § 1.1311 to the presiding Administrative Law Judge within 30 days of the release of this Order, with a copy to the Chief, Audio Services Division.

23. IT IS FURTHER ORDERED, That Carta, Welch and VFB shall submit amendments in accordance with paragraph 7 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

24. IT IS FURTHER ORDERED, That Brostrom shall submit an amendment in accordance with paragraph 8 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

25. IT IS FURTHER ORDERED, That Decker shall submit an amendment in accordance with paragraph 9 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

26. IT IS FURTHER ORDERED, That Cruz shall submit an amendment in accordance with paragraph 10 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

27. IT IS FURTHER ORDERED, That Carta shall submit an amendment in accordance with paragraph 11 hereinabove to the presiding Administrative Law Judge within 30 days of the release of this Order.

28. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, the following applicants shall submit Section VI information in accordance with the requirement of 47 C.F.R. § 73.2080(c) to the presiding Administrative Law Judge: Decker, JMHB.

29. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: CBCI, VRL, 3M.

30. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

31. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

32. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to 47 C.F.R. § 1.221(c), in person or by attorney, within 20 days of the mailing of this Order, not later than March 11, 1988, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

33. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to 47 U.S.C. § 311(a)(2) and 47 C.F.R. § 73.3594, give notice of the hearing within the time and in the manner therein prescribed, and shall advise the Commission of the publication of such notice as required by 47 C.F.R. § 73.3594(g).

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] 47 C.F.R. § 73.3518 provides that "[w]hile an application is pending and undecided, no subsequent conflicting or inconsistent application may be *filed* by or on behalf or for the benefit of the same applicant, successor or assignee." (Emphasis added). Furthermore, New Life did not request a waiver of either 47 C.F.R. § 73.3518 or § 73.3555.

[2] On March 3, 1987, JMHB filed petitions to deny the above applications based on allegations that these applicants have failed to provide a 70 dBu signal to the entire proposed community of license without requesting a waiver of 47 C.F.R. § 73.315(a). JMHB's petitions to deny are essentially petitions to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcast Applications; Amendments of* Part 1 of the Commission's Rules, 72 FCC 2d 202 (1979), directed the deletion of all issue pleadings in pending cases, the matters raised in these petitions would not ordinarily be considered in the Hearing Designation Order. Because the engineering study has determined, however, that all applicants in the instant proceeding have proposed city coverage in substantial compliance with 47 C.F.R. § 73.315(a), JMHB's petition to deny will be dismissed as moot. Similarly, the city-grade waiver requests made by Carta, Decker, JMHB, VRL, Community First, Welch, and VFB will also be dismissed as moot.

[3] These studies must also include calculations of exposure levels measured at the base of the tower which account for the cumulative effect of the proposed facilities in conjunction with all other broadcast facilities and construction permits sharing the proposed tower. Specifically, the effects of any co-located AM, FM, or TV stations must be considered in the respective evaluations of radiofrequency exposure. In addition, the radiofrequency limits for roof-mounted proposals should be calculated at the roof level rather than at the actual ground level.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-35

In re Applications of

SUNRISE PARTNERS (hereafter Sunrise)	File No. BPH-860829MB
S F B CORPORATION (hereafter SfB)	File No. BPH-860902MA
HOOVER COMMUNICATIONS CORP. (hereafter Hoover)	File No. BPH-860902MB
LAKES REGION BROADCASTING, INC. (hereafter Lakes)	File No. BPH-860902MC
OSSIPEE MOUNTAINS BROADCASTING, INC. (hereafter Ossipee)	File No. BPH-860902ME

For a Construction Permit for
a New FM Station on
Channel 295A (106.9 MHz)
in Moultonborough, NH

HEARING DESIGNATION ORDER

Adopted: January 27, 1988; Released: February 19, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Ossipee*. SfB has filed a petition to deny Ossipee's application, to which Ossipee has filed an opposition and SfB a reply.[1] SfB alleges that at the time Ossipee filed its application it did not possess the requisite basic legal qualifications, as it had not yet formally incorporated with the state of New Hampshire. SfB contends the application was thus inadvertently accepted for filing and should therefore now be dismissed.

3. SfB's petition to deny is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcast Applications* ; *Amendments of Part 1 of the Commission's Rules*, 72 FCC 2nd 202, 45 RR 2nd 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters raised in SFB's petition have not been considered. Accordingly, an opportunity to raise any allegations therein will be afforded SfB post-designation pursuant to 47 C.F.R. § 1.229.

4. The applicants below have petitioned for leave to amend their applications after the last date for filing amendments as of right. These amendments report significant changes in information previously furnished to the Commission and, pursuant to 47 C.F.R. § 1.65, are accepted for filing. However, the applicants may not improve their comparative position after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from these amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Sunrise	12/10/86, 12/29/87
Hoover	6/25/87

5. Data submitted by the applicants indicate there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

6. Since no determination has been received from the Federal Aviation Administration as to whether the antenna proposed by the applicant below would constitute a hazard to air navigation, an issue with respect thereto will be included and the F.A.A. made a party to the proceeding.

APPLICANTS: Lakes

7. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

8. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by the following applicant would constitute a hazard to air navigation: Lakes.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

9. IT IS FURTHER ORDERED, That the petition to deny filed by SfB against the Ossipee application IS HEREBY DENIED to the extent indicated herein.

10. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by the following applicants ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein: Sunrise, and Hoover.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than March 11, 1988, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] SfB filed a petition to dismiss on Febuary 27, 1987 and a petition to deny, containing identical allegations, on August 20, 1987. Consequently, two oppositions ensued, March 11, 1987 and September 1, 1987, as well as two replies, March 23, 1987 and September 15, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-36

In re Applications of

W & W BROADCAST SERVICE (hereafter W & W)	BPH-860903MD
DALE BROADCASTING, INC. (hereafter Dale)	BPH-860903MI
FRANK L. PEARSON (hereafter Pearson)	BPH-860903MK

For Construction Permit
for a New FM Station,
Dadeville, Alabama, Channel 247A.

HEARING DESIGNATION ORDER

Adopted: January 27, 1988; Released: February 19, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.[1]

2. Data submitted by the applicants indicate there would be significant differences in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m, or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

3. *City Coverage*. Due to recent annexation to the Southeastern portion of Dadeville, W & W's proposal covers only 95 percent of the city of license. W & W therefore requests a waiver of the Commission's city coverage rule, 47 C.F.R. § 73.315(a), if one is deemed necessary. However, no waiver of 47 C.F.R. § 73.315(a) is required when an applicant proposes to include more than 80 percent of the community of license within the 3.16 mV/m contour. *See Letter to Southwest Communications, Inc.*, from Dennis Williams, Acting Chief, FM Branch, (reference 8920-HVT), July 16, 1986, *citing John R. Hughes, et al.*, 50 Fed. Reg. 5679 (1985). Therefore, the waiver request is unnecessary and will be dismissed as moot.

4. *EEO*. In response to Section VI of FCC Form 301, Pearson has indicated that he will employ five or more fulltime employees. Therefore, he is required to submit the five-point Model Equal Employment Opportunity (EEO) Program (FCC Form 396A). The guidelines to the Model EEO Program, paragraph IV, instruct the applicant to specify the sources that it proposes to use in recruiting minority and female applicants. Pearson has not provided specific sources of minority recruitment in its EEO program. Accordingly, he will be required to amend his application, within 30 days of the release of this Order, by submitting these specific sources of minority recruitment to the presiding Administrative Law Judge.

5. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That pursuant to 47 C.F.R. § 309(e) the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order upon the following issues:

1. To determine, which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced, pursuant to the foregoing issues, which of the applications should be granted, if any.

7. IT IS FURTHER ORDERED, That the request for waiver of § 73.315(a) filed by W & W IS DISMISSED AS MOOT.

8. IT IS FURTHER ORDERED That pursuant to paragraph 4 above, Pearson shall file with the presiding Administrative Law Judge, within 30 days of the release of this Order, an amendment specifying minority recruitment sources it proposes to utilize in filling job vacancies.

9. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief Data Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

10. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to § 1.221(c) of the Commission's Rules, in person, or by attorney, within 20 days of the mailing of this Order, not later than March 11, 1988, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to § 311(a)(2) of the Communications Act of 1934, as amended, and § 73.3594 of the Communications Rules, give notice of the hearing, within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by § 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTE

[1] A fourth applicant, Telemedia Services Corporation, was voluntarily dismissed by letter dated January 19, 1988 by the Chief, FM Branch (reference 8920-KEH)

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-38

In re applications of

SELECTRONICS CORPORATION (hereafter Selectronics) File No. BPH-851018MD

RADIO VERMONT, INC. (hereafter RVI) File No. BPH-851018ME

MOUNTAIN MEDIA, INC. (hereafter MMI) File No. BPH-851018MC (DISMISSED)

For a Construction Permit for
a New FM Station on
Channel 241A in Warren, Vermont

HEARING DESIGNATION ORDER

Adopted: January 28, 1988; Released: February 19, 1988

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Preliminary Matters. MMI.* On October 18, 1985, MMI filed its application for a new FM station in Warren, Vermont, and on March 24, 1986, the Chief, FM Branch returned that application as inadvertently accepted for tender. Thereafter, on April 23, 1986, MMI filed a timely Petition for Reconsideration which was granted by letter on February 13, 1987. MMI was subsequently reinstated *nunc pro tunc* and accepted for filing on March 4, 1987.

3. On April 3, 1987, Selectronics filed a timely Petition to Dismiss or Deny MMI's application. Selectronics alleges in its Petition that MMI's proposed transmitter site is short-spaced to station CJFM-FM, Montreal, Quebec, Canada, in violation of 47 C.F.R. § 73.207, the *Canadian-United States FM Broadcasting Agreement of 1947* and the *Working Arrangement for the Allotment and Assignment of FM Broadcasting Channels 201-300 Under the Canadian-U. S. FM Broadcasting Agreement of 1947* (September 7, 1984) (*Working Arrangement).*

4. The Warren, Vermont allotment, for which MMI is applying, is for Channel 241A. CJFM operates on first adjacent Channel 240C1. Section 73.207 of the Commission's Rules and the *Working Arrangement* require a minimum separation between a Class A station and a first adjacent Class C1 station of 164 kilometers. The spacing between MMI's proposed site and CJFM's transmitter site is 161.9 kilometers and is thus short-spaced by 2.1 kilometers.

5. On April 16, 1987, MMI filed a timely Opposition to Selectronics' Petition to Dismiss or Deny. MMI, in its Opposition, asserts that it is in compliance with the *Working Arrangement.* MMI bases its argument on Section 3.5 of the *Working Arrangement* dealing with specially negotiated short-spaced allotments. MMI interprets this section to mean that if an applicant is short-spaced, then that will open the way for negotiations between the two signatory nations. That is not a correct interpretation of Section 3.5. Section 3.5 of the *Working Arrangement* allows for negotiations between the U.S. and Canada when the allotment itself is short-spaced, not if the proposed site of one applicant is short-spaced. The Warren, Vermont allotment is not short-spaced; thus Section 3.5 is inapplicable in this instance.

6. MMI further alleges that its short-spacing is *de minimis.* MMI's proposed site is short-spaced by 2.9 kilometers which cannot be considered *de minimis.* In *Kenter Broadcasting Company*, FCC 86-269, released June 12, 1986, *aff' d per curiam*, Case No. 86-1399 (D.C. Cir. 1987) the Commission found that it "[has] not discovered any case in which [it has] excused an applicant requesting a short-spacing waiver from making a threshold showing[1] when the short-spacing was more than one mile or 1.6 kilometers. Nor [does it] think that it would be appropriate to invoke the *de minimis* exception in any case, were one to arise, where an applicant proposed to be short-spaced by more than one mile or 1.6 kilometers, and does not make the threshold showing." (footnote added) Since the short-spacing involved here is greater than 1.6 kilometers it is not *de minimis.*

7. Finally, and most important, MMI failed to timely request waiver. 47 C.F.R. § 73.3566(a) states, in pertinent part, that applications "patently not in accordance with FCC rules, regulations, or other requirements, unless accompanied by an appropriate request for a waiver will not be accepted for filing or if inadvertently accepted for filing will be dismissed." Thus, under the Commission's rules, MMI's application must be dismissed as not in accordance with the spacing rules and failing to include a waiver request of the rule. *See Donovan Burke* 60 RR 2d 110 (1986).

8. MMI, although not filing a waiver request with its original application, submitted a motion for leave to file an untimely waiver. This request will be denied. MMI proffers, as justification for an untimely waiver, its possible misinterpretation of the *Working Arrangement.* This is not sufficient justification. The *Public Notice* of the *Working Arrangement* (issued November 19, 1984) made it clear that "[a]pplications filed more than 30 days after the implementation date [of the *Working Arrangement*] may be returned as defective if they do not comply with the new Working Arrangement." The implementation date of the *Working Arrangement* was September 7, 1984, and MMI's application was filed much more than 30 days later, on October 10, 1985. Thus, the *Public Notice* provided MMI with the requisite notice that its application would be returned if it violates the *Working Arrangement.*

9. Since adequate notice was provided of both the spacing rules as codified in the Code of Federal Regulations, and the limits imposed by the *Working Arrangement*, MMI has provided no grounds to justify a deviation from FM processing standards. The amendment procedure adopted in the *Report and Order* of Docket 84-750, 50 Fed. Reg. 19936 (May 13, 1985) was adopted to provide service to the public quickly and efficiently. While it may be desir-

able to have a number of qualified applicants from which to select a broadcast licensee "[w]e have recently undertaken to place greater emphasis on providing service to the public in the most efficient, expeditious manner possible. Temporizing with flawed proposals has in the past disserved the public interest by inordinately delaying the institution of new service." *Chudy Broadcasting Corporation*, 58 RR2d 133, 134, n. 7 (1985).

10. In light of the above, we find that MMI has filed a defective application which was inadvertently accepted for filing and that no waiver can at this time be considered. Accordingly, to avoid further delays, MMI's application is hereby dismissed.[2]

11. *Site Availability*. MMI argues further in its Opposition to Selectronics' Petition to Deny that the other applicants do not have acceptable sites. MMI's allegations are essentially attempts to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcast Applications ; Amendments of Part 1 of the Commission's Rules*, 72 FCC 2d 202 (1979), directed the deletion of all issue pleadings in pending cases, the matters raised in MMI's allegations would not ordinarily be considered in the Hearing Designation Order. Because of the unique circumstances presented with the submission of a Settlement Agreement, to be discussed in Paragraph 14, below, it was necessary to consider the issues raised by MMI in order to make a determination as to the acceptability of the proposed Agreement. MMI's first allegation in its Opposition, considered herein because of the singular situation at hand, is that there will be "severe adverse local reaction" to Selectronics' site. In the first instance, MMI's argument is too speculative to require an issue to be submitted for hearing. "Reasonable assurance" does not require zoning approval prior to grant of an application. *Gareth F. Garlund and Anna White Garlund (KIQO)*, 69 FCC 2d 2006 (1978) Further, a sworn affidavit regarding the likelihood of local opposition by MMI's own attorney is unpersuasive. Finally, this situation is easily distinguishable from *Clearlake Broadcasting Co.*, 47 Fed. Reg. 47931 (October 28, 1982) on which MMI relies. In *Clearlake* the applicant raised the questions of fact requiring a hearing in a timely request for a waiver of our spacing rules; MMI failed to file such a timely waiver.

12. MMI does, however, raise significant questions of fact regarding RVI's site which go directly to the acceptability of the proposed Settlement Agreement discussed in paragraph 14, below. In its Opposition to Selectronics' Petition to Dismiss or Deny, MMI asserts that the property on which RVI has proposed to construct its transmitter has been sold and the new owners have not been contacted. RVI subsequently notified the Commission on August 6, 1987, by a Motion for Leave to Amend and an accompanying amendment, that its site had indeed been lost. As of this date, RVI has not yet submitted any new site on which RVI proposes to construct its transmitter. On August 20, 1987, MMI filed a timely Objection to RVI's Motion for Leave to Amend. MMI makes numerous allegations in its Objection which go directly to RVI's candor in this proceeding. The thrust of MMI's argument is that RVI knew by April 16, 1987, at the latest, that its site had been lost, since that is when MMI pointed out that fact in its Opposition pleading against Selectronics' Petition. Therefore, RVI knew that its site was no longer available three and one-half (3-1/2) months prior to RVI's amendment informing the Commission. Furthermore, First Vermont Bank, the current owner of the land, gained possession of the site more than eight (8) months prior to RVI's amendment. MMI argues that RVI has failed to show "good cause" for such a delay in apprising the Commission of such changes. MMI also raises questions of fact concerning RVI's original site certification. The individual signing RVI's original site certification was Walter A. Zinn. Although Mr. Zinn signed RVI's certification on October 15, 1985, MMI alleges that Mr. Zinn had sold the site on October 6, 1981, more than four years prior to the filing of RVI's application. According to MMI, David and Rene Disick, the owners of the land from October 6, 1981 until October 26, 1986, who owned the site at the time of filing, were never contacted by RVI. The Disicks sold the land to its current owner, First Vermont Bank on October 26, 1986. First Vermont Bank, MMI alleges, has also not been contacted about using the site for a transmitter. All of MMI's allegations in this regard are uncontroverted by RVI. Therefore, although MMI's allegations directed towards Selectronics are unsupported by affidavits, being undisputed by RVI, the allegations do raise a question sufficient to warrant the specification of an appropriate site availability issue. Furthermore, the Commission has held that a contingent misrepresentation issue should be specified for hearing in circumstances similar to those found here. *See e.g., Dutchess Communications Corp.*, 101 FCC 2d 243, 58 RR 2d 381 (Rev. Bd. 1985); *Cannon Communications Corp.*, 101 FCC 2d 169, 58 RR 2d 950 (Rev. Bd. 1985), *review denied*, FCC 86-244 (May 15, 1986); *Houston Family Television, Ltd.*, 101 FCC 2d 661, 58 RR 2d 1557 (Rev. Bd. 1985). Accordingly, an appropriate contingent misrepresentation issue will be specified regarding whether RVI failed to comply with 47 C.F.R. § 1.65 with respect to its site availability and timely report the above matters to the Commission.

13. *Selectronics*. On October 16, 1987, Selectronics filed a Petition for Leave to Amend and an accompanying amendment proposing a new transmitter site, explaining that Selectronics' originally proposed site is no longer available. Selectronics explains that through no fault of its own, the landowner of the originally proposed site unilaterally withdrew the option for Selectronics to construct.[3] Selectronics' October 16, 1987, Petition for Leave to Amend contains nothing more than a bare allegation by its attorney and a signed statement by the president of Selectronics that the information contained within the Petition is true. We find that this does not suffice as good cause for us to accept a late-filed amendment. Bare assertions without accompanying supporting affidavits cannot be regarded as establishing good cause for acceptance under any set of criteria. Selectronics' Petition for Leave to Amend is therefore denied and the accompanying amendment is hereby returned.

14. On October 22, 1987, RVI and Selectronics filed a Joint Request for Approval of Agreement. Under the terms of the Agreement, Selectronics would dismiss its application for the grant of RVI's application. In light of the matters discussed in paragraph 12, above, and the resultant contingent issue specified below, we do not find that approval of this agreement would serve the public interest. Therefore, approval of the Joint Agreement is denied, Selectronics application will not be dismissed, and both RVI's and Selectronics' applications are designated for hearing.

15. *Other Matters.* The applicant below has petitioned for leave to amend its application on the dates shown. The accompanying amendments were filed after the last date for filing minor amendments as of right. Under Section 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANT	AMENDMENTS FILED
RVI	March 30, 1987; August 6, 1987

16. Data submitted by the applicants indicates that there would be significant difference in the size of the areas and populations which would receive service from the proposals. Consequently, the areas and populations which would receive FM service of 1 mV/m or greater intensity, together with the availability of other primary aural services in such areas, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to any of the applicants.

17. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

18. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. (a) To determine whether RVI has reasonable assurance that the transmitter site specified will be available to it.

(b) To determine, in light of the facts and circumstances adduced pursuant to issue 1(a) above, whether RVI timely apprised the Commission of site availability pursuant to 47 C.F.R. § 1.65.

(c) To determine, in light of the facts and circumstances adduced pursuant to issues 1(a) and 1(b), above, whether RVI misrepresented facts to or concealed information from the Commission.

(d) To determine, in light of the facts adduced pursuant to the foregoing issues, whether RVI possesses the the basic qualifications to be the licensee of the facilities sought here.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest;

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted, if any.

19. IT IS FURTHER ORDERED, That the application by MMI IS HEREBY DISMISSED.

20. IT IS FURTHER ORDERED, That the October 3, 1987 Petition to Dismiss or Deny MMI's application filed by Selectronics IS GRANTED to the extent indicated herein.

21. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by RVI on March 30, 1987, and August 6, 1987, ARE HEREBY GRANTED, and the corresponding amendments ARE HEREBY ACCEPTED to the extent indicated herein.

22. IT IS FURTHER ORDERED, That the October 16, 1987 petition for leave to amend filed by Selectronics IS DENIED, and the corresponding amendment IS HEREBY RETURNED.

23. IT IS FURTHER ORDERED, That the October 22, 1987 Request for Approval of the Joint Agreement filed by RVI and Selectronics IS HEREBY DENIED.

24. IT IS FURTHER ORDERED, That in addition to the copy served on the Chief, Hearing Branch, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on Chief, Date Management Staff, Audio Services Division, Mass Media Bureau, Room 350, 1919 M St., N.W., Washington, D.C. 20554.

25. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, not later than March 11, 1988, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date specified in this Order.

26. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

FOOTNOTES

[1] The threshold showing is a showing of no available fully spaced site, and that the applicant demonstrates that the public interest will be served despite the minor deviation from the Commission's spacing rule.

[2] In order to better utilize the Bureau's limited processing staff resources, the Commission has approved staff consideration and disposition of tenderability and acceptability matters in the context of the relevant hearing designation order rather than in a separate action document. *Teton Broadcasting*, 1 FCC Rcd 518, 521 n.5 (1986).

[3] Although RVI is currently without a site and there is a serious question raised as to Selectronics' retention of an available site, this situation does not breathe new life into MMI's argument in its April 16, 1987, Opposition to Selectronics' April 3, 1987

Petition to Dismiss or Deny, that we should allow a short-spaced site since neither of the other applicants have acceptable sites. Although *Kenter Broadcasting, supra*, holds that the precedent to granting a request for a waiver is showing that the sites proposed by other applicants are unacceptable, or unattainable, it is well established that "[u]nless the short-spaced applicant requested a waiver of § 73.207 [in its original application], the Commission would not accept its application for filing." (Footnote omitted) *Donovan Burke, supra*, at 845. Since MMI did not request a waiver in its original application, the issue of whether or not RVI and Selectronics have secured acceptable sites is irrelevant and of no consequence to our action dismissing MMI's application.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-68

In the Matter of

Policies Regarding Detrimental
Effects of Proposed New Broadcast
Stations on Existing Stations

ERRATUM

Released: February 19, 1988

On February 11, 1988, the Commission released a Report and Order (FCC 87-364) in the captioned proceeding. Inadvertently, Commissioner Dennis' statement was omitted. It is attached hereto.

FEDERAL COMMUNICATIONS COMMISSION

SEPARATE STATMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

IN THE MATTER OF POLICIES REGARDING DETRIMENTAL EFFECTS OF PROPOSED NEW BROADCAST STATIONS ON EXISTING STATIONS

This Report and Order only eliminates the *Carroll* Doctine and the UHF impact policy. The item conludes that the theory of ruinous competition is no longer valid in the broadcast field. It does not in any way address issues related to economic impact or technical harm in the context of authorizing new broadcast services or broadcast services that do not share the same regulatory benefits and obligations.[1] It does not conclude, nor suggest, that economic analysis is not an important factor in formulating policies affecting the UHF service.

FOOTNOTE FOR STATEMENT

[1] See Report and Order at Paragraphs 23, 30 and 31.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-345

In re Application of

LIVING FAITH MINISTRIES, INC. File No. BPCT-860529KF

For Construction Permit for a New TV Station Bluefield, West Virginia

NOTICE

Released: February 19, 1988

Administrative Law Judge John M. Frysiak's Summary Decision in this proceeding (FCC 87D-47) was released December 31, 1987. No exceptions have been filed, and the Commission has not ordered a review of the Summary Decision on its own motion. Fifty days have passed since public release of the Summary Decision. Pursuant to Section 1.276 of the Commission's Rules, the Summary Decision became effective on February 19, 1988 without action by the Commission.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-138

In re Applications of

ELAINE C. EICHER	File No. BPH-850712ZH
HOME TOWN BROADCASTING, INC.	File No. BPH-850712ZI
MARANATHA BROADCASTING CO., INC.	File No. BPH-850712ZJ
JAMES A. POUNDS	File No. BPH-85071202

For Construction Permit
for a New FM Station
Appomattox, Virginia

Appearances

Stephen Diaz Gavin on behalf of Elaine C. Eicher; *J. Richard Carr* on behalf of Home Town Broadcasting, Inc.; *J. Geoffrey Bentley* on behalf of Maranatha Broadcasting Co., Inc.; *Keith E. Putbrese* and *Denise B. Moline* on behalf of James A. Pounds; *Brian Kilbane* and *Larry Miller* on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

INITIAL DECISION OF
ADMINISTRATIVE LAW JUDGE
WALTER C. MILLER

Issued: February 8, 1988; Released: February 19, 1988

1. Originally nine mutually-exclusive applicants applied for authority to operate a new FM station on 102.7 MHz (Channel 274B) in Appomattox, Virginia. Four remain: Elaine C. Eicher (Eicher); Home Town Broadcasting, Inc. (Home Town); Maranatha Broadcasting Co., Inc. (Maranatha); and James A. Pounds (Pounds).

2. The Chief, Audio Services Division designated the case for hearing on May 15, 1987. *See* 52 F.R. 18955 published May 20, 1987. After the case filtered down to four applicants, and after the interlocutory cycle had run its course, the following issues remained to be resolved:[1]

> 1. To determine whether Home Town Broadcasting Inc.'s application violates the Commission's cross-interest policy and, if so, whether that applicant is qualified for a grant;[2]
>
> 2. To determine which of the proposals would, on a comparative basis, best serve the public interest; and
>
> 3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applicants should be granted, if any.

3. An additional matter must be considered under the standard comparative issue. The Chief, Audio Services Division has called for comparative coverage evidence. *See* 52 F.R. 18955 *supra.*, paragraph 2.

4. We held the prehearing conference on August 20, 1987, the evidentiary admission session on September 20, 1987, and the hearing on October 5 and 6, 1987. The record was closed on October 26, 1987 (FCC 87M-2667).

5. All four applicants, along with the Mass Media Bureau, filed their Proposed Findings of Fact on December 18, 1987. Three of the four applicants: Eicher, Maranatha and Pounds filed Reply Findings on December 28, 1987. Home Town filed no Reply Findings.

FINDINGS OF FACT

Home Town's Cross-Interest Issue

6. Home Town has a two-tier ownership structure. It has both voting and non-voting stock. All 100% of the non-voting stock is held by another corporation, HTB, Inc. (HTB). That 100% represents 40% of Home Town's equity.

7. Three individuals hold Home Town's voting stock. Phyllis Giles holds 33 1/3% of its voting stock (20% of the equity), and is the Corporation's Secretary-Treasurer; Margaret Harris owns 33 1/3% (20% of the equity), is the Corporation's President, and is the proposed General Manager; and Ora Scruggs McCoy owns the remaining 33 1/3% of the voting stock, and is the Corporation's Vice-President.

8. The non-voting shareholder's, HTB's (*See* Finding 6 *supra.*), stock is held by two individuals. Phyllis Giles owns 51% of the stock, and is HTB's President. Her husband, Roy E. Giles owns the remaining 49% of HTB's stock, and is its Vice-President. Thus the Giles, via HTB and Phyllis Giles, own 60% of Home Town's equity (Home Town Ex. 1).

9. HTB is presently the licensee of two radio stations in Appomattox, Virginia, WTTX(AM) and (FM). WTTX(AM) and (FM) are the only stations licensed to Appomattox or to any communities in Appomattox county. WTTX(AM) and (FM) have simulcast since 1982. Although she owns no stock in HTB, Margaret Harris is General Manager of WTTX(AM) and (FM). Neither Home Town nor HTB have ever amended their applications to show that Margaret Harris will not be the General Manager of all three stations. The only newspaper published in Appomattox is a weekly newspaper.

10. When Home Town filed its Channel 274B application on July 12, 1987, the Giles represented that they would sell WTTX-FM before commencing program tests on the new station. However, they made no such representation for WTTX-AM. They made only a conditional commitment to divest WTTX-AM "if . . . a decision is issued on comparative grounds . . . within 3 years of commencement of hearing . . ."

11. Because the Giles failed to make an unconditional commitment, the Presiding Officer added a cross-interest issue. *See* FCC 87M-1734, released July 22, 1987.[3] In so

doing he noted that " . . . [t]he dual role of [both] Phyllis Giles and Margaret Harris could potentially impair arms length competition in the Appomattox market . . . " He further noted that both Mrs. Giles and Ms. Harris would have access to confidential information for the only stations licensed to Appomattox, and that these records would include financial records, costs, salaries, customer lists and rate deals.

12. The addition of the cross-interest issue caused Home Town to restructure its divestment commitment (*See* Finding 10 *supra*.). On August 6, 1987, Home Town sought to amend its application to reflect the new commitment.[4] There Phyllis Giles, HTB's President and 51% stockholder, promised to sell both WTTX(AM) and (FM) *if* she could obtain the consent of HTB's minority 49% stockholder, her husband, Roy E. Giles. The Presiding Officer granted Home Town's unopposed amendment. But he noted that substituting one contingent divestment pledge for another didn't help Home Town in meeting its burden of proceeding and burden of proof on the cross-interest issue. *See* FCC 87M-1974, released August 20, 1987.

13. At the hearing Mr. and Mrs. Giles took still a third bite at the apple. They said they had now agreed to divest both WTTX(AM) and (FM) prior to commencing program tests (Home Town Exs. 6 and 7). But this testimony cannot be credited, since it is not only inherently inconsistent with its other divestment pledges, it also varies from Home Town's application as amended on August 6, 1987 (*See* Findings 12 *supra*.).[5]

14. The record evidence shows that the Appomattox market is a small one that is susceptible to potential competitive impairment. Appomattox had a 1980 U.S. Census population of 1,345 people, and Appomattox County where it's located has 11,971 people. The County has only 89 retail establishments and 46 service establishments. It ranks 92nd out 136 Virginia communities in Retail Sales Volume, and 100th out of 132 Virginia communities in service revenues (*See* Pounds Ex. 5).

15. The record further shows that the two existing stations, and the proposed FM station have the technical ability to impair competition in the Appomattox market. Both WTTX(AM) and (FM), as well as the proposed FM station, would serve *all* of Appomattox County (*See* Home Town Ex. 10).[6] The proposed FM's 1.0 mV/m contour completely encompasses WTTX-FM's 1.0 mV/m service area, and most of WTTX-AM's 0.5 mV/m service area.

16. In fact, and even without a grant of the FM proposal the Giles have very little competition for the advertising dollar in the Appomattox market. The rates on the WTTX-AM/FM rate card are substantially lower than the rates for stations assigned to nearby Lynchburg ($10-$15 lower), and lower than rates for the nearby Farmville, Virginia stations ($3-$4 lower) (*See* Maranatha Ex. 4, p. 2; Tr. 431-432).

17. *Issue 1 - Intermediate Findings*. Home Town has failed to carry either its assigned burden of proceeding or its burden of proof on the cross-interest issue. In fact, it didn't offer any proposed findings of fact on the subject (*See* Footnotes 2 and 6 *supra*.). While Mr. and Mrs. Giles have given some indication that they will divest themselves of WTTX(AM) and (FM), if they are granted here, that indication cannot be credited. They've given at least three different and inconsistent versions of their divestment plans. So Home Town will be disqualified under Issue 1.

18. Even *assuming* that Home Town didn't have the evidentiary burdens assigned to it, the record evidence (most of which was supplied by Maranatha and Pounds) shows that a sufficient potential for undue influence, contingent control, and unfair competition exists. Even without a grant of the proposed FM station at issue here; i.e., with their present AM-FM combination the Giles have a virtual lock on the Appomattox market.[7] So Home Town's cross-interest disqualification is supported by the weight of the evidence.

ISSUE 2 - THE STANDARD COMPARATIVE ISSUE

Description of the Applicants

19. *Elaine C. Eicher*. Elaine Eicher has filed her application for FM Channel 274B at Appomattox as an individual applicant.

20. *Home Town Broadcasting Co., Inc*. Home Town, a Virginia corporation, was created for the purpose of applying for and operating a new FM radio station in Appomattox, Virginia. It has a two-tier ownership structure, voting and non-voting stock. Its officers, directors, and shareholders are (Home Town Ex. 1):

CHART

Shareholder	Office	% stock	% corporate equity
Margaret P. Harris	President, Director	33 1/3% voting	20%
Ora Scruggs McCoy	Vice-President, Director	33 1/3% voting	20%
Phyllis B. Giles	Secretary/ Treasurer, Director	33 1/3% voting	20%
HTB, Inc.		100% non-voting preferred	40%

21. *Maranatha Broadcasting Co., Inc*. Maranatha, a Pennsylvania corporation, has the following officers, directors, and shareholders (Maranatha Ex. 1.)

CHART

Shareholder	Office	% of Ownership
Richard C. Dean	President, Director	90%
David G. Hinson	Secretary/ Treasurer, Director	5%
Barry N. Fisher	Director	5%

22. *James A. Pounds*. James Pounds has filed his application for FM Channel 274B at Appomattox as an individual applicant.

Diversification of Mass Media

23. *Elaine C. Eicher*. Mrs. Eicher has no cognizable ownership interest in any medium of mass communication. She is an owner and general partner in a non-wireline cellular telephone licensee in the Harrisburg,

Pennsylvania MSA. She is also the general partner of a general partnership that has ownership interests (each less than 1%) in several smaller cellular telephone markets.

24. *Home Town.* Neither Home Town, Ms. Harris nor Ms. McCoy have any cognizable ownership interest in any medium of mass communications. However, Ms. Harris, the proposed General Manager of the Channel 274B proposal, is also the current General Manager of WTTX(AM) and (FM), Appomattox, Virginia. These two stations are licensed to HTB, Inc., holder of 100% of Home Town's non- voting preferred stock (*See* Finding 20 *supra.*). For *diversification* purposes, Home Town is being held to the divestiture promise it made in its original application filed on July 12, 1985. Home Town is well aware of that. When it filed its integration statement in this proceeding, it represented that Ms. Harris " . . . will continue to be General Manager of WTTX-AM . . .

25. Phyllis Giles and her husband, Roy Giles own a 51% and 49% interest in HTB, Inc. At the time Home Town filed its application on July 12, 1985, they represented that HTB would divest of WTTX-FM within one year after program test authority, and WTTX-AM within three years of that date if Home Town's application were granted. While they subsequently tried to alter that commitment to their comparative advantage, that is the commitment they are being held to for diversification purposes.

26. *Maranatha.* Maranatha is the licensee of WFMZ(FM), and WFMZ(TV) in Allentown, Pennsylvania. The Allentown-Bethlehem market is ranked 60th in the nation, and is 285 air miles from Appomattox, Virginia.[8]

27. Through an affiliate, MBC Communications Southwest, Inc., Maranatha has an attributable ownership in KKJY(FM), Albuequerque, New Mexico. The Albuequerque market is ranked 82nd in the nation, and is 1600 air miles from Appomattox.

28. Maranatha is also the proposed assignee for WELQ(FM), an unbuilt Class A FM facility at Hertford, North Carolina. Hertford is an unranked market, and is about 200 air miles from Appomattox.[9]

29. Richard Dean, Maranatha's controlling principal, is also an officer and director of United Educational Broadcasting, Inc. (United). United is permittee of WBMR(FM), a non-commercial educational station in Telford, Pennsylvania.[10] Dean is also the president and sole shareholder of Lehigh Valley Mobile Telephone Company, the selectee for a new multi- channel MDS service in Atlantic City, New Jersey (Maranatha Ex. 3).

30. *James A. Pounds.* Pounds has no cognizable ownership interest in any medium of mass communications. He is presently General Manager of Station WREL(AM), Lexington, Virginia, and WVLI(FM), Buena Vista, Virginia. But he has promised to resign before he commences operations if his application is granted.

31. Home Town and Maranatha continue their attack on Pounds' diversification position. They continue to argue that Pounds is more than the General Manager of WREL(AM) and WVLI(FM). WREL(AM) and WVLI(FM) are owned by Equus Communications, Inc., and two of Equus' major principals are the Putbrese brothers (Keith and Jimmy Lee). Home Town and Maranatha argue that Mr. Pounds' close past relationship with the Putbrese brothers somehow disqualifies him in this proceeding.

32. These attacks are rejected for either of two reasons. First, there is no basic qualifying issue in this case which would permit the Presiding Officer to disqualify James Pounds, even if he wanted to. Secondly, he doesn't want to. He's gone over the assertions on which Home Town and Maranatha rely on at least two prior occasions, and he rejected them. *See* FCC 87M-2119, released September 8, 1987, and FCC 87M-3030 released November 23, 1987.

33. *Diversification - Intermediate Findings.* Based on Findings 23- 32 *supra.*, some intermediate comparative findings are in order. Neither Eicher (Finding 23) nor Pounds (Findings 30-32) have any cognizable ownership interest in any medium of mass communications. So neither is entitled to a comparative advantage over the other.

34. However, both Eicher and Pounds are entitled to a *decisional comparative preference* over Home Town.[11] Home Town's principals already own both an AM and FM station in the community of license. While they made a divestiture pledge in their original application filed July 12, 1985, that pledge is too indefinite to remove the stigma of a diversification demerit (Findings 24-25 *supra.*).

35. Eicher and Pounds are entitled to a *substantial comparative preference* over Maranatha. Maranatha has extensive holdings, primarily concentrated in States adjoining Virginia where Appomattox is located. It is the licensee or permittee of three FM stations and a television station. Three of those properties are in the top 100 markets. Maranatha's unbuilt FM station in Hertford, North Carolina is only 200 air miles from Appomattox, and its Allentown FM and TV holdings are only 285 miles away (Findings 26-28 *supra.*).

36. Moreover, and heaped upon its several broadcast holdings, Maranatha is chargeable with media interests through its controlling shareholder and President Richard Dean. Dean is an officer and director of United Educational Broadcasting, Inc., permittee of non-commercial educational station WBMR(FM) in Telford, Pennsylvania. He is also president and sole shareholder of Lehigh Valley Mobile Telephone Company, the tentative selectee for a new MDS facility in Atlantic City, New Jersey.

37. Thus under the diversification criterion, and before we even get to the best practicable service aspects, we see that Home Town (assuming it were basically qualified) is out of the comparative running, and Maranatha is all but out of it.

THE BEST PRACTICABLE SERVICE

Comparative Coverage

38. The following chart (Joint Ex. 1, Table 6) depicts the total areas and populations each applicant will cover within their proposed 1 mV/m contour:

CHART

Applicant	Population Covered	Area (Sq. km)
Eicher	118,629	8,487
Home Town	110,998	8,562
Maranatha	117,929	8,484
Pounds	110,738	8,496

39. No applicant will provide daytime service to any underserved areas, but they will nighttime. The following chart shows the underserved nighttime service each will provide:

CHART

	Eicher	Home Town
1st Service		10
Population:	10	10
Area:	1	1
	Maranatha	Pounds
1st Service		
Population:	10	0
Area:	1	0
	Eicher	Home Town
2nd Service		
Population:	14,014	10,654
Area:	383	303
	Maranatha	Pounds
2nd Service		
Population:	14,703	14,914
Area:	421	459
	Eicher	Home Town
3rd Service		
Population:	41,907	38,864
Area:	1,306	1,340
	Maranatha	Pounds
3rd Service		
Population:	39,663	38,089
Area:	1,298	1,293
	Eicher	Home Town
4th Service		
Population:	30,744	29,928
Area:	741	753
	Maranatha	Pounds
4th Service		
Population:	30,559	29,519
Area:	740	744
	Eicher	Home Town
5th Service		
Population:	31,954	31,742
Area:	846	909
	Maranatha	Pounds
5th Service		
Population:	33,003	28,215
Area:	816	779

40. *Comparative Coverage - Intermediate Findings.* Based on the previous Charts, certain salient intermediate coverage findings can be made. First (Finding 38 *supra.*) the difference in overall coverage is not great enough to warrant giving anyone even a slight comparative preference.

41. The same is true (Finding 39 *supra.*) for nighttime white area (1st Service). The 10 people Eicher, Home Town, or Maranatha would serve are insufficient to warrant giving them a preference over Pounds.

42. However, turning to grey areas (2nd service) we see that Eicher, Maranatha, and Pounds will each provide a second aural service to at least 2,360 more people than Home Town will. This entitles each of the three to a moderate preference over Home Town. Eicher's moderate preference is reinforced by her greater third and fourth service advantage over Home Town; i.e., 3,243 people and 816 people. Similarly Maranatha's moderate preference over Home Town is reinforced by its greater third and fourth service; i.e., 999 people and 63 people.

43. When Pounds and Eicher are compared, neither warrants receiving an advantage. Pounds brings a second service to 900 more people than Eicher. On the other hand Eicher has a third and fourth service advantage of 5,043 persons over Pounds. These advantages balance out, and no comparative coverage exists between Pounds and Eicher.

44. In sum, Eicher, Maranatha, and Pounds each warrant a moderate comparative coverage over Home Town[12] because they provide a greater second aural nighttime service. All other minor comparative coverage preferences balance each other out leaving Eicher, Maranatha, and Pounds equal for comparative coverage purposes.

INTEGRATION OF OWNERSHIP WITH MANAGEMENT

45. *Elaine C. Eicher.* Elaine Eicher seeks 100% quantitative integration. She will devote a minimum of 40 hours per week as General Manager of the proposed station. In that capacity she will be primarily and ultimately responsible for both all the day-to-day and long-range decisions. She will oversee program production, hire the staff, purchase the equipment, develop station news' and editorial policies, and oversee compliance with all the Commission's rules and policies.

46. Mrs. Eicher is married, and currently resides at 4506 Verplanck Place, N.W., Washington, D.C. with her husband (John P. Eicher) and son (Robert, born in 1975). If she is awarded the CP for Appomattox, she will establish a full-time residence in Appomattox (Eicher Ex. 4, p. 3). Her husband and son would spend as much time as practicable in Appomattox but maintain their primary residence in Washington.[13]

47. Elaine Eicher was born on June 6, 1943 in Pittsburgh, Pennsylvania. From 1961 to 1965, she attended Catholic University of America in Washington, D.C. She received a B.S. Degree in Mathematics.

48. In September 1965, Mrs. Eicher went to work for the Central Intelligence Agency (CIA) as a scientific programmer. She stayed with the CIA for seventeen years, until 1983. During her tenure at the CIA she wrote technical Requests for Proposals and evaluated the responses; she managed large-scale external contracts to determine the effectiveness of weapons systems; and she managed an interagency team that produced the Annual Report on Soviet Nuclear Weapon System Capabilities.

49. While at the CIA she was selected for, and attended George Washington University for one year of full-time graduate study in operations research, management science, and policy analysis. Mrs. Eicher's final CIA assignment was to head a staff of seven professionals for the Director of Weapons Research.

50. Mrs. Eicher hasn't been employed on a full-time basis since 1983. However, she has managed her own personal investments, such as the Appomattox FM application and her Special Mobile Radio Service applications; she operates a financial and tax accounting business. During the past year she attended Benjamin Franklin University in Washington, D.C. She has completed all of the accounting courses that are a prerequisite to becoming a CPA in the District of Columbia.

51. Eicher claims no broadcast experience, no existing local residence, and no civic participation. But she does seek female enhancement credit.

52. Mrs. Eicher's opponents have attacked her integration proposal. They argue that it strains credulity and shouldn't be credited. They say that Mrs. Eicher will not leave her husband, a Federal government employee, and their twelve year old son to live as bachelors in their northwest Washington residence while she moves to Appomattox to establish a separate residence so that she can work full-time as General Manager of the proposed station.

53. Mrs. Eicher counters that attack. She repeats that although her husband and son would remain in their Washington, D.C. address she personally would establish full-time residency in Appomattox, purchase a house there, and vote in and pay taxes to the State of Virginia. She indicated that Appomattox would be her primary residence (Eicher Ex. 4, p. 3; Tr. 320, 329-330, 350).

54. Elaine Eicher will be credited with 100% quantitative integration. Her opponents point to circumstances which do indeed suggest that she won't live up to her integration pledge. But the evidence is just that - circumstantial. Mrs. Eicher has made her integration pledge under oath; she has adhered to it; and absent compelling evidence to the contrary it must be credited.

55. *Home Town Broadcasting, Inc.* Home Town seeks only 33 1/3% quantitative integration. It proposes to integrate, Margaret P. Harris, its President, a Director, and 33 1/3% voting stock owner (20% of the corporate equity), as the full-time General Manager of the FM proposal. Mrs. Harris intends to work a minimum of 40 hours a week in that capacity.[14]

56. In her capacity as General Manager, Mrs. Harris would be responsible for the radio station's day-to-day operations. She will supervise all employees and handle payroll, prepare and administer the budget, set goals for the sale staff, work with the Program Director to implement programming decisions; and oversee the operation of the equipment in conjunction with a contract engineer.

57. Margaret Harris is 40 years old, and has lived in Appomattox all her life. She has thirteen years of broadcast experience. She has acquired that experience at WTTX AM-FM in Appomattox. Between 1974 and 1980, she worked as the station's switchboard operator, secretary/bookkeeper, disc jockey, program director and sales person. In 1980 she became General Manager of WTTX AM-FM.

58. Mrs. Harris has been active in Appomattox civic affairs. She is active in her church, and has been a Sunday School teacher for about eight years; she is a member of the Chamber of Commerce, and The Women's Club; she has done volunteer work with the Bloodmobile; and she is presently working with the Appomattox Assembly to build a community youth center. Mrs. Harris claims female enhancement for her 33 1/3% voting stock and 20% equity.

59. *Maranatha Broadcasting Co., Inc.* Maranatha seeks no quantitative or qualitative integration. So for comparative purposes, it receives 0% quantitative integration.

60. *James A. Pounds.* James Pounds seeks 100% quantitative integration. He will devote a minimum of 40 hours per week as General Manager of the proposed station. In that capacity, and on a day-to-day basis he will supervise and direct all station activities and personnel, including operations, sales, personnel, programming, news and community relations.

61. James Pounds, born on December 25, 1946, currently resides in Lexington, Virginia.[15] He will move to Appomattox and take up permanent residence if his application is granted.

62. Pounds has considerable prior broadcast experience. From 1968 until December 1976, he was variously employed in full-time and part-time positions as News Director, Sales Executive, Sales Manager, Program Director, Chief Engineer, and Announcer at Stations WAKE(AM), Valparaiso, Illinois; WLCL(FM), Lowell, Indiana; WLNR(FM), Lansing, Illinois; and WWCA(AM), Gary, Indiana.

63. From December 1976 until August 1977, he served as full-time General Sales Manager for WILO AM/FM, Frankfurt, Indiana. In August 1977, he became the full-time Station Manager at WDZQ(FM), Decatur, Illinois. He held that position until July 1981.

64. From July 1981 until August 1983, Pounds was the full-time General Sales Manager for KAAY(AM) and KLPQ(FM) in Little Rock, Arkansas. Between August 1983 until November 1984, he worked as the full-time General Manager for KXRK(AM) in Davenport, Iowa. During November and December, 1984, Pounds was a Sales and Programming Consultant for WBIS(AM), Bristol, Connecticut, and from January-Setpember 1985, he was a full-time Broadcast Consultant at WIHM(FM), Normal, Illinois.

65. Since 1985, Pounds has been the General Manager of WLVE-FM, Buena Vista, Virginia and WREL-AM, Lexington, Virginia. Those two stations are licensed to Equus Communications, Inc. Major principals in Equus are Keith Putbrese (Pounds' counsel), and his brother, Jimmy Lee Putbrese.

66. Pounds' opponents have mounted a two-prong attack on his 100% integration claim. First they claim that Pounds is nothing more than a front, " . . . an old and faithful retainer of the Putbrese family and law firm . . ." Secondly, they claim that Pounds must be given a substantial comparative demerit for his lack of candor in dealing with the State Corporation Commission of Virginia.

67. Those attacks are rejected. The Presiding Officer has had occasion to rule on the facts underlying those attacks on two prior occasions. He has specifically held that James Pounds is the sole applicant in BPH- 85071202. *See* FCC 87M-2119 released September 8, 1987. He has further ruled that Pounds admitted peccadillos before the Virginia State Corporation Commission were minor and didn't require inquiry since Pounds had " . . . candidly admitted that he dissembled," since "he had set the record straight with the Virginia Corporation Commission" and since "no one had been injured in the interim." *See* FCC 87M-3030 released November 23, 1987. Nothing has occurred since

those rulings that would warrant a different result. James Pounds' claim to 100% quantitative integration will be honored.

68. *Integration - Intermediate Findings.* Both Elaine Eicher and James Pounds are entitled to 100% quantitative integration (Findings 54 and 67 *supra.*). Maranatha is entitled to 0% integration (Finding 59 *supra.*). So even without considering Eicher's and Pounds' substantial comparative preference over Maranatha under the diversification criterion (Finding 35 *supra.*), it is obvious that Maranatha is eliminated from any further consideration. *See The New Continental Broadcasting Co.*, 88 FCC 2d 830, 50 RR 2d 1117 (1981); *Van Buren Community Service* 87 FCC 2d 1018, 50 RR 2d 115 (1981); and *Canon Point Broadcasting Co.*, 93 FCC 2d 643 (Rev. Bd. 1983) at 649.

69. Similarly, Eicher and Pounds are entitled to 100% quantitative integration, while Home Town is, at most,[16] entitled to 33 1/3% for Margaret Harris claim. This eliminates Home Town from any further comparative consideration. So even if Home Town had met its cross-interest issue, which it didn't (Findings 6-18 *supra.*); even if Eicher and Home Town weren't entitled to a decisional comparative preference over Home Town under the diversification criterion, which they are (Finding 34 *supra.*) and even if Home Town wasn't disadvantaged under the comparative coverage aspects of the proceeding, which it is (Findings 41-44 *supra.*) no useful purpose would be served in giving Home Town any further consideration.[17]

AUXILIARY POWER

70. All four applicants propose to provide an auxiliary power supply at both the proposed studio and transmitter sites for emergency use during power outages. So no one obtains a comparative advantage under that criterion.

ULTIMATE FACTS AND PRELIMINARY CONCLUSIONS OF LAW

1. Four applicants are vying for FM Channel 274B (102.7 MHz), Appomattox, Virginia: Elaine C. Eicher, Home Town Broadcasting, Inc., Maranatha Broadcasting Co., Inc., and James A. Pounds. They have adduced evidence on two factual issues, Home Town's cross-interest issue (Issue 1), and the standard comparative issue (Issue 2).

2. We must first consider Home Town's cross-interest issue. For it is axiomatic that only basically qualified applicants are entitled to a comparative analysis. *See* e.g. *Louis Adelman.*, 29 FCC 1223, 18 RR 1062 *affirmed sub. nom. Guinan* v. *Federal Communications Commission*, 297 F.2d 782, 22 RR 2026 (1961).

Issue 1 - Home Town's Cross - Interest Issue

3. We must find out if Home Town's application violates the Commission's cross-interest policy, and if so, if Home Town is qualified for a grant. When the cross-interest issue was added, both the burden of proceeding and the burden of proof were placed upon Home Town. *See* FCC 87M- 1734, released July 22, 1987.

4. Home Town is not qualified for a grant. It hasn't met either of its evidentiary burdens. While it submitted *some* evidence on the issue at the hearing, it failed to prepare and submit any proposed findings on the cross- interest question. This, standing alone, constitutes a failure of proof, and mandates a denial of Home Town's application.

5. Moreover, the available factual evidence, most of which was submitted by Maranatha and Pounds, shows that a grant of Home Town's application would violate the Commission's cross-interest policy. The small Appomattox market is susceptible to potential competitive impairment. Both of Giles' existing stations, WTTX AM-FM, as well as the proposed station would serve *all* of Appomattox county. There is presently very little competition for the advertising dollar in the market. Both Phyllis Giles and Margaret Harris would have access to confidential information, including financial records, costs, salaries, customer lists, and rate deals. So a more than sufficient potential for undue influence, contingent control, and unfair competition exists. So even if Home Town had tried to meet its burden of proceeding and burden of proof, the weight of the evidence points to a denial of Home Town's application under Issue 1. So Home Town's application will be denied.

Issue 2 - The Standard Comparative Issue

6. Thus three applicants remain for comparative consideration:[18] Eicher, Maranatha, and Pounds. They will be analyzed under the criteria set out in the Commission's *1965 Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393 as modified by subsequent Review Board and Commission decisions. We will direct our analyses toward two primary objectives: (1) selecting the applicant that will offer the greatest diffusion of control of mass communications media; and (2) selecting the applicant that will offer the best practicable service to the public.

7. *Diversification of Mass Media.* Neither Eicher nor Pounds have any cognizable ownership interests in any medium of mass communications. So neither is entitled to a comparative advantage over the other. However, each is entitled to a *substantial* comparative preference over Maranatha. Maranatha has extensive holdings, primarily concentrated in states adjoining Virginia. It is the licensee or permittee of three FM stations and a television station. Three of those properties are in the top 100 markets. Maranatha's unbuilt FM station in Hertford, North Carolina is only 200 air miles from Appomattox, and its Allentown, Pennsylvania FM and TV holdings are only 285 miles away.

8. Moreover, and through its controlling stockholder, and President Richard Dean, Maranatha is chargeable with other media interests. Dean is an officer and director of United Educational Broadcasting, Inc., permittee of noncommercial educational station WBMR(FM) in Telford, Pennsylvania. He is also president and sole shareholder of Lehigh Valley Mobile Telephone Company, the tentative selectee for a new MDS facility in Atlantic City, New Jersey.

9. The *substantial comparative preference* that Eicher and Pounds have garnered over Maranatha places that applicant a distant third in the comparative analysis even before we look at who will offer the best practicable service to the public.

10. *The Best Practicable Service to the Public.* In deciding which of the three applicants will offer the best practicable service to the public, we will consider five major criteria: (1) whether any applicant should be preferred because of a superior areas and populations proposal

(comparative coverage); (2) the degree to which each applicant will integrate their ownership into the day-to-day management of the station (quantitative integration); (3) the qualitative attributes each integrated owner will bring to that day-to-day management (qualitative integration); (4) whether the degree of quantitative and qualitative integration each will bring is enhanced by minority or female ownership; and (5) auxiliary power. Criterion (4), qualitative integration, includes an analysis of such sub-criteria as local residence, participation in civic affairs in the proposed service area, past broadcast experience, and past education and business experience.

11. *Comparative Coverage*. None of the three applicants is entitled to a preference for comparative coverage (Findings 38-44 *supra*.).

12. *Quantitative Integration*. Both Elaine Eicher and James Pounds are entitled to 100% quantitative integration. Maranatha is credited with 0% quantitative integration since it seeks none. Thus Eicher and Pounds are entitled to a decisive comparative preference over Maranatha, and Maranatha will receive no further comparative consideration.

13. *Qualitative Integration*. Neither Eicher nor Pounds can claim *local residence*. However, each has promised to move to Appomattox if their application is granted. So neither is entitled to a preference under this sub-criterion. Neither of them have ever participated in *civic affairs* within their proposed service area. So neither is entitled to a comparative preference on that score.

14. Turning to *past broadcast experience, past education, and business experience*, Pounds is entitled to a *clear* preference over Eicher on these sub-criteria of "only minor significance." *See The New Continental Broadcasting Company*, 88 FCC 2d 830 (Rev. Bd. 1981) at para. 30.

15. Unquestionably Pounds has a sterling record of prior broadcast experience going back to 1968 (Findings 62-65 *supra*.). That broadcast experience is rich and varied. It includes non-management, management, and consulting experience. It is non-ownership experience and therefore not subject to the criticism set out at para. 30 of *New Continental, supra*. In brief, the same thing can be said about James Pounds that was said about Jerome Thomas Lamprecht in the Middletown, Maryland Initial Decision at Footnote 11. *See Jerome Thomas Lamprecht*, FCC 84D-42 released June 14, 1984. He is a career broadcaster ready for an ownership role.

16. Elaine Eicher has no prior broadcast experience. But her past education and business experience are laudable. There is no reason to believe that she could not adequately own and manage a small broadcast operation. But, on balance, Eicher's excellent educational and business background, can't match Pounds' sterling prior broadcast experience, and he is entitled to a clear preference under these qualitative integration sub-criteria.

17. *Minority or Female Enhancement*. Eicher is entitled to a *substantial* preference on this score. Her already strong 100% integration showing is enhanced by her female participation in the station's top management slot; i.e., the General Manager. James Pounds, a white non-hispanic male, is entitled to no enhancement.

18. *Auxiliary Power*. Both Eicher and Pounds will provide an auxiliary power supply at both the proposed studio and transmitter sites for emergency use during power outages. *See* Finding 70 *supra*. So neither is entitled to a comparative preference on that score.

ULTIMATE CONCLUSION

19. Under designated Issue 3 we must determine which of the four remaining applicants should be granted. Home Town has failed to demonstrate that it is basically qualified to be a Commission licensee, and is thus eliminated from comparative consideration. *See* Conclusions 3-5 *supra*.[19]

20. Maranatha suffers from a substantial comparative diversification and claims no quantitative integration (0%). So it is eliminated.

21. This leaves Elaine Eicher and James Pounds. Neither is entitled to a comparative coverage advantage over the other. Both claim and are entitled to 100% quantitative integration. Neither are entitled to a qualitative advantage for local residence, or civic activity.

22. James Pounds is entitled to a *clear* preference over Mrs. Eicher under the qualitative attribute of past broadcast experience. However, that sub-critera is of only minor significance. *See* Conclusions 14-16. On the other hand Eicher is entitled to a *substantial* female enhancement preference over Pounds who is a white, non-hispanic male. So, on balance, Mrs. Eicher's substantial preference under one of the Commission's major comparative criterion (female and minority enhancement)[20] outweighs Pounds' clear preference for past broadcast experience; i.e., a sub-criteria of only minor significance. Thus, it is concluded that Elaine Eicher will offer the best practicable service to the public in the Appomattox, Virginia area, and her application will be granted.

So, unless an appeal is taken from this Initial Decision or the Commission reviews it on its own motion, Elaine C. Eicher's application (BPH- 850712ZH) IS GRANTED; and Home Town Broadcasting, Inc.'s (BPH-850712ZI), Maranatha Broadcasting Co., Inc.'s (BPH-850712ZJ), and James A. Pounds' (BPH-85071202) applications ARE DENIED.[21]

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] In the interest of uniformity, and so they will harmonize with the record made thus far, the remaining issues have been renumbered.

[2] Both the burden of proof and the burden of proceeding on Issue 1 were placed on Home Town. *See* FCC 87M-1734, released July 22, 1987. Those assignments become important since Home Town submitted no proposed findings of fact on the cross-interest issue designated against it.

[3] Maranatha sought the cross-interest issue in a Petition filed June 19, 1987.

[4] That amendment was late-filed. It was due on July 15, 1987. *See* FCC 87M-1167 released May 22, 1987 at paras. 8-9.

[5] HTB has a tentative agreement to sell WTTX(AM) and (FM) to a Mr. David Antoniak. But the Giles may decide not to sell the station if Home Town doesn't receive the grant. They haven't made a firm decision (Tr. 504-509, 530).

[6] While most of the cross-interest evidence was supplied by Pounds and Maranatha, Home Town did supply some engineering data. However, and while it referred to "Cross Interest Issue Findings" (*See* Home Town P.F. 12), it did not prepare and submit any such findings (*See* Footnote 2 *supra*.).

[7] During the year September 4, 1986 through September 4, 1987, WTTX(AM)- (FM) ran no newspaper advertisements, made no promotional presentations to advertising agencies, printed no program listings or program guides, or paid for any surveys of the listening audience (*See* Joint Stipulation No. 1).

[8] Maranatha has filed and is currently prosecuting applications for new FM stations at Gulf Breeze, Florida, and Grand Junction, Colorado.

[9] Maranatha does not propose to divest any of its interests if its Appomattox application is granted.

[10] Although Dean's non-ownership interest in WBMR(FM) is cognizable, it is too remote, standing alone, to be afforded significance as a comparative factor in this case. *See Waters Broadcasting Corporation*, 91 FCC 2d 1260 (1982) at para. 10.

[11] This assumes that Home Town is basically qualified and therefore entitled to a comparative analysis. But *See* Findings 6-18 *supra*.

[12] Again we are assuming that Home Town is basically qualified and therefore entitled to a comparative coverage analysis. *See* Footnote 11 *supra*.

[13] Her husband is employed by the U.S. Government Department of Transportation in Washington, D.C.

[14] At the hearing Home Town claimed that Mrs. Harris will resign her full- time position as General Manager of WTTX AM-FM if Home Town is granted the CP. But in the June 9, 1987 Integration Statement filed in this case, Home Town represented that "[s]he will continue to be General Manager of WTTX-FM." Home Town has offered no excuse for this inconsistency.

[15] Although Lexington isn't far from Appomattox, Pounds' residence is not within his proposed FM station's service area.

[16] As previously noted, Home Town's claim for Margaret Harris' integration is inconsistent. *See* Footnote 14 *supra*.

[17] Note, however, that full comparative findings have been made on all applicants.

[18] As previously noted, even if Home Town were eligible for comparative consideration, it wouldn't be seriously considered. It's decisionally inferior under the diversification criterion, its comparative coverage position is lacking, and its quantitative integration proposal is decisionally sub-standard. *See* Findings 34, 44, and 69 *supra*.

[19] Also see Footnote 18 *supra*.

[20] *See Waters Broadcasting Corporation*, 91 FCC 2d 1260 (1982).

[21] If exceptions aren't filed within 30 days, or the Commission doesn't review the case on its own motion, the Initial Decision will become effective 50 days after its public release. *See* 47 CFR 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 86-162

In re Applications of

ELIJAH BROADCASTING CORPORATION Walkersville, Maryland	File No. BP-850411AD
HEAD HOG LIMITED PARTNERSHIP McLean, Virginia	File No. BP-850701AI
RESTON COMMUNITY BROADCASTING, INC. Reston, Virginia	File No. BP-850701AK
WGTS, INC. College, Park, Maryland	File No. BP-850701AR

For Construction Permit
for a New AM Station

MEMORANDUM OPINION AND ORDER

Adopted: January 29, 1988; Released: February 19, 1988

By the Review Board:

1. This proceeding is pending before the Review Board on exceptions to an *Initial Decision*, 2 FCC Rcd 4468 (1987)(I.D.), which granted the application of Reston Community Broadcasting, Inc. (RCBI). On November 20, 1987, RCBI timely and properly filed a petition for leave to amend its application to report that on October 25, 1987 it was notified by the owners of its proposed transmitter site that the site would be sold to a residential developer. RCBI further stated that it "is diligently pursuing alternative transmitter sites and expects to identify a new site soon." (Petition at 1.) On November 24, 1987, Elijah Broadcasting Corporation (Elijah), a competing applicant herein, moved, *inter alia*, to dismiss RCBI's application based upon the loss of RCBI's proposed transmitter site. [1]

2. It is well-settled that applicants before the Commission must demonstrate that they have reasonable assurance that their proposed transmitter sites will be available to them. *Progressive Communications, Inc.*, 61 RR 2d 560 (Rev. Bd. 1986); *Alden Communications Corp.*, 102 FCC 2d 518 (Rev. Bd. 1985); *Dutchess Communications Corp.*, 101 FCC 2d 243, 252 (Rev. Bd. 1985); *Cannon Communications Corp.*, 101 FCC 2d 169, 173 (Rev. Bd. 1985), *rev. denied*, FCC 86-244, released May 15, 1986. In light of RCBI's concession that it no longer has reasonable assurance of the availability of a transmitter site, apparently because of circumstances beyond its control, and the fact that it received notice to this effect over three months ago, we will afford RCBI a period of sixty days to file an amendment to its application, accompanied by a showing of good cause, specifying a new site. If no such amendment is forthcoming in that time, we will move forthwith to address the motion to dismiss its application. However, we put RCBI on specific notice that we expect it to fully document in its showing of "good cause" the reasonable assurance it had obtained for its original site, as well as all the facts and circumstances (including a copy of the notification letter of October 25, 1987 from the landowner) concerning the loss of RCBI's original site.

3. ACCORDINGLY, IT IS ORDERED, That the motion to dismiss filed November 24, 1987 by Elijah Broadcasting Corporation IS GRANTED to the extent indicated herein and the applications of Head Hog Limited Partnership (File No. BP-850701AI) and WGTS, Inc. (File No. BP-850701AR) ARE DISMISSED; and that Reston Community Broadcasting, Inc. IS AFFORDED sixty (60) days from the release date of this Order to amend its application as specified above.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTE

[1] Related pleadings before us are an opposition filed December 8, 1987 by RCBI and a reply filed December 18, 1987 by Elijah. Elijah also moved to dismiss the competing applications of Head Hog Limited Partnership and WGTS, Inc. These applicants were denied by the I.D. and have not filed exceptions; accordingly, pursuant to 47 CFR 1.276 (f), their applications will be dismissed.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS MANAGEMENT, INC. — File No. I-T-C-88-049

Application for authority to operate as an international resale carrier

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: February 10, 1988; Released: February 22, 1988

By the Acting Chief, International Facilities Division:

1. We have before us for consideration an application, filed on December 8, 1987 by Communications Management, Inc. (CMI), requesting authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing carriers to provide international switched voice service between the U.S. and various overseas points. The application was placed on public notice on December 30, 1987. No comments were received.

2. Upon review of the application, we find that the applicant has the legal, technical and financial qualifications to provide the proposed services. CMI, a Kentucky corporation, is already providing domestic resale services. It now proposes to resell international switched voice services in competition with other carriers already providing resale of such service. In recent authorizations of new entrants, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future convenience and necessity require the provision of international switched voice services to the general public by CMI.

4. Accordingly, IT IS ORDERED that application File No. I-T-C-88-049 IS GRANTED and CMI is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs FCC Nos. 1 and 2, MCI Telecommunications Corp.'s Tariff FCC No. 1, US Sprint's Tariffs FCC Nos. 1 and 2, between the U.S., Hawaii, Puerto Rico and the Virgin Islands, on the one hand, and those points listed in those tariffs on the other hand.

5. Copies of any operating agreements entered into between CMI and its correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that CMI shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203 and Part 61 of the Commission's rules, 47 C.F.R. Part 61, for the services authorized in this order.

7. This order is issued under Section 0.291 of the Commission's rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

UNITED STATES TRANSMISSION SYSTEM, INC. File No. I-T-C-88-045

Application for authority to acquire and operate facilities for service to the USSR

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: February 11, 1988; Released: February 22, 1988

By the Acting Chief, International Facilities Division:

1. The captioned uncontested application, filed on December 9, 1987, by United States Transmission System, Inc. (USTS), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite facilities for direct service to the USSR. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service to the USSR by USTS.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-88-045 IS GRANTED, and USTS is authorized to:

a. lease and operate two voice-grade circuits in the Etam, West Virginia earth station;

b. lease from Comsat and operate two voice-grade satellite circuits between the Etam, West Virginia earth station and an appropriate satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in the USSR, furnished by USTS' correspondent in the USSR; and

c. use said facilities to provide USTS' regularly authorized services, including voice service, between the U.S. and the USSR and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to insure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between USTS and its correspondent in the USSR, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. This authorization is effective on its release date and shall be continued year-to-year, unless the Commission notifies the applicant to the contrary and requires a new application to be filed. If the Commission requires a new application to be filed, the authorization will continue in effect until Commission action on the application.

6. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-65

In the Matter of

Amendment of Section 73.202(b), RM-6188
Table of Allotments,
FM Broadcast Stations.
(East Hemet and Indio, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 29, 1988; Released: February 18, 1988

By the Chief, Allocations Branch:

1. The Commission considers herein the petition for rule making filed on behalf of Claridge Broadcasting Corp. (petitioner), licensee of Station KCMJ-FM (Channel 224A), Indio, California, seeking the substitution of Channel 225B for Channel 224A and modification of its license accordingly to reflect the higher-powered channel. In order to accommodate its proposal, petitioner requests the deletion of Channel 225A at East Hemet, California.[1]

2. Petitioner premises its proposal on a desire to avoid a conflict between Channel 225A at East Hemet and its plans to provide an expanded service to the residents of Indio. The distance between the Indio reference point and Channel 225A at East Hemet[2] is 58.7 kilometers, whereas 163 kilometers is required between Class A-B co-channels. A staff engineering study confirms that if Channel 225A is removed from East Hemet, Channel 225B could be allotted to Indio in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter site therefor is restricted to an area 7.0 kilometers northwest of the community to avoid short-spacing to Station KJOK(FM) (Channel 226C1), [3] Yuma, Arizona.

3. In support of its proposal, petitioner claims that East Hemet does not qualify as a "community" for allotment purposes. Although petitioner acknowledges that East Hemet is listed as a Census Designated Place (CDP) by the United States Census, it nevertheless claims there is no place in the area so designated. Further, petitioner advises that East Hemet contains no indicia or community life the Commission commonly associates with establishing such status *(i.e.,* social, economic or cultural components). Petitioner has submitted various statements taken from a survey of community leaders in Hemet, California, attesting that there is no location legally designated as "East Hemet". Rather, it is asserted that East Hemet is merely a neighborhood designation indicating its geographical location to Hemet. Petitioner adds that neither does the United States Postal Service recognize it as a separate area from Hemet. The consensus of the survey indicates that residents of Hemet do not identify themselves or any businesses with East Hemet. Thus, petitioner comments, lacking any of the indicia the Commission associates with conferring community status upon a location, Channel 225A should be deleted from East Hemet, citing *Yorktown, VA*, 38 FR 6695 (1973); *Cascade Village, CO*, 48 FR 19917 (1983); and *Vimville, MS*, 55 RR 2d 256 (1983).

4. In further support of its modification proposal, petitioner claims that it could increase its service area 205.8% (from 3,664 square kilometers to 11,203 square kilometers), involving a concommitant increase in population within its proposed service area of 89% (from 130,087 to 245,576 persons). Therefore, petitioner believes there are overriding public interest justifications to merit the requested deletion of Channel 225A at East Hemet, California.

5. The Commission allotted Channel 225A to East Hemet, California, in MM Docket No. 84-231, on the basis of an expression of interest in receiving a first local service. No issue was raised at that time concerning the status of East Hemet as a community for allotment purposes.

6. Section 307(b) of the Communications Act of 1934, as amended, requires that the Commission allocate channels " . . . among the several States and communities." Communities, for allocation purposes, have been defined as geographically, identifiable population groupings. In the absence of such recognizable factors, the proponent must present the Commission with sufficient information to demonstrate that such a place has social, economic or cultural indicia to qualify it as a "community" for allocation purposes. *See , Ansley, AL*, 46 FR 58688 (1981); *Red Rock, GA*, 48 FR 36170 (1983); and *Ellwood, CA*, 50 FR 13031 (1985). Moreover, it should be noted that the Census Bureau's listing of East Hemet as a "place" is not conclusive as to its community status since the Census does not consider the various criteria utilized by the Commission in reaching its determination of community status.

7. While the Commission will not routinely entertain a proposed channel deletion absent a compelling showing of need or Commission error,[4] we believe that, on the basis of the information presented, petitioner has supplied sufficient justification for its proposal. If, in fact, it is determined that East Hemet does not qualify as a "community", the allotment of a channel there was in error. Therefore, we shall seek comments on the proposal to delete Channel 225A from East Hemet, as well as petitioner's modification request to substitute Channel 225B for Channel 224A at Indio and to modify the facilities of Station KCMJ-FM accordingly. Interested parties should submit sufficient information as set forth in paragraph 6, *supra*, to support retention of Channel 225A at East Hemet.

8. In the event East Hemet is found to be unqualified as a "community" for retention of Channel 225A, we shall also propose herein to modify the license of Station KCMJ-FM, as requested by petitioner, to reflect operation on Channel 225B in lieu of Channel 224A at Indio, California. Pursuant to the authority contained in Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the Indio, California, modification proposal. Although petitioner requested the issuance of an order to show cause in connection with its modification request, such action is not required.

9. Accordingly, we shall propose to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

City	Channel No. Present	Proposed
East Hemet, California	225A	–
Indio, California	224A, 272A	225B,272A

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before April 11, 1988 1988, and reply comments on or before April 26, 1988, and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Robert L. Olender, Esq.
Baraff, Koerner, Olender
and Hochberg, P.C.
2033 M Street, N.W.
Suite 203
Washington, D.C. 20036-3355

11. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

12. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTES

[1] Channel 225A was allotted to East Hemet, California in MM Docket No. 84-231, and was the 60th channel selected, for which applications may ultimately be accepted.

[2] Reference coordinates for Channel 225A at East Hemet are: 33-42-48, 116-54-25.

[3] The reference coordinates of the restricted site are as follows: 33-45-12l, 116-16-31. This restriction also protects an application filed by Station KJOK(FM) (BPH-870218IE) to reclassify its facilities to maintain Class C status, utilizinga reference site located at 32-40-20, 114-20-07.

[4] *See* , Memorandum Opinion and Order, 50 FR 47391 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 83-657
and 84-835

In re Applications of

THE SEVEN HILLS TELEVISION COMPANY — File Nos. BRCT-830601KJ and BPTT-840308IQ

For Renewal of License of
KTVW-TV
Phoenix, Arizona, *et al.*

MEMORANDUM OPINION AND ORDER

Adopted: February 9, 1988; Released: February 22, 1988

By the Review Board:

1. The Review Board has under consideration: (1) a Joint Petition filed December 14, 1987 by Univision, Inc. (formerly SIN, Inc. or Spanish International Network) and Emilio Azcarraga Milmo on behalf of himself and members of his family (Azcarraga) requesting partial reconsideration of our Decision in *Seven Hills Television Co.*, 2 FCC Rcd 6867 (Rev. Bd. 1987), *erratum*, 2 FCC Rcd 7099; and (2) a Motion filed December 23, 1987 by the Mass Media Bureau to dismiss the Joint Petition. In *Seven Hills*, which was the residuum of a larger proceeding designated for hearing under the caption *Spanish International Communications Corp.*, [1] and which consequently involved the question of whether Seven Hills was controlled by aliens or their representatives in violation of Section 310(b)(3) of the Communications Act of 1934, as amended, the Board granted the Seven Hills license renewal application subject to several conditions intended to ensure future Seven Hills compliance with the statute and with statutory policy. Essentially, those conditions limited the principals and employees of Seven Hills from entering significant business and financial relationships with Univision and/or foreign interests yet controlled by the Azcarraga family. The instant Joint Petition seeks modification of those conditions on Seven Hills. In addition, it challenges a finding that Seven Hills violated the Commission's reporting requirements prescribed by Section 1.65 of the Commission's rules. [2] For the reasons set forth *infra*, we will grant the Bureau's Motion to Dismiss.

2. Section 1.106 of the Commission's Rules, 47 CFR §1.106, which sets forth the requirements governing petitions for reconsideration, provides that such petitions may only be filed by: (1) parties to the proceeding; or (2) if not a party, by any person whose interests are "adversely affected" by the agency's action who can show good reason why it was not possible to participate in the earlier stages of the proceeding. Section 1.223 of our Rules, 47 CFR §1.223, governing petitions to intervene to become a party, has a similar "good cause" requirement for untimely petitions. An unanticipated result is not conventionally recognized as "good cause" for lack of earlier participation in an agency proceeding. *See Committee for Community Access v. FCC*, 737 F.2d 74, 84 (D.C. Cir. 1984).

3. Notwithstanding, Univision submits that it is entitled to contest the Board's *Seven Hills* decision because its predecessor-in-interest, SIN, Inc., was granted leave to intervene on August 17, 1983 in *Spanish International*; that it has never formally withdrawn as a party; and that it has never been dismissed from the residual *Seven Hills* proceeding. Alternatively, and assuming it is no longer a party, Univision argues that it is "adversely affected" by our *Seven Hills* decision because the conditions set forth therein would have harmful and overreaching effects on its purported "freedom of contract." Univision additionally claims that it meets the "good cause" standard for its prior non-participation in the Board's review of the exceptions relating to Seven Hills because it had no earlier opportunity to comment on the conditions of the decision. Sr. Azcarraga, who never previously sought discrete party status, and does not formally do so here, advances a similar argument, asserting that the subject conditions unexpectedly and unfavorably invoke his family's name. Azcarraga argues that, if the Seven Hills license renewal conditions remain unchanged, they may transform him "into a pariah with whom those unfamiliar with the fine points of this proceeding are reluctant to deal."

4. We find the arguments of the petitioners to be without merit. At the outset, Univision's contention that it is a party to the *Seven Hills* proceeding is rejected. All of the original parties in *Spanish International*, with the exception of the Seven Hills applicant, filed a Joint Motion on August 19, 1986 urging: (1) grant of all other designated license renewal applications; (2) severance of only the remaining Seven Hills application; (3) termination of the proceeding with respect to the other pending renewal applications; and (4) dismissal of all prior pleadings with respect to those applications. By *Memorandum Opinion and Order*, 1 FCC Rcd 92, *see* note 1, *supra*, the Board granted the Joint Motion and severed the Seven Hills application as proposed. Univision, if dissatisfied with that action, had thirty days to challenge the ruling by filing an appropriate application for review. *See* Section 1.115(d) of the Commission's Rules, 47 CFR §1.115(d). Not having done so, Univision intentionally withdrew from its party status and, like Azcarraga, must be properly scrutinized to ascertain whether it now and/or again qualifies for standing to file a petition for reconsideration of *Seven Hills* under the second prong of Section 1.106.

5. We further find that neither Univision nor Azcarraga meets the "good cause" intervention standard prescribed by the Commission's rules, since their instant requests for reconsideration are almost entirely predicated on a claim of unanticipated results. This basis, as we have said, is legally insufficient. *See Committee for Community Access v. FCC, supra*. Even assuming for the sake of argument, however, that "good cause" had been demonstrated here, petitioners' requested relief would be denied because neither Univision nor Azcarraga has shown that it is "adversely affected" within the meaning of Section 1.106 of our rules; *i.e.*, with respect to Univision, that the conditions imposed by our *Seven Hills* decision restrict in some impermissible degree Univision's (and Azcarraga's) "freedom of contract," simply because the Seven Hills principals and employees are delimited from entering into

certain specified relationships with the petitioners. [3] That injury is far too speculative to justify participation here. *See, e.g., Minnesota Microwave, Inc.*, 2 RR 2d 269 (Rev. Bd. 1964)(petitioners' economic interests as proposed customers of service provided by applicant too speculative and remote to warrant participation as parties in interest); *Hertz Broadcasting of Birmingham, Inc.*, 46 FCC 2d 350 (Rev. Bd. 1974)(financial interests of major creditor of applicant do not constitute adequate basis to qualify petitioner as a "person aggrieved"). Moreover, we find nothing whatsoever in the *Seven Hills* decision that could possibly affect adversely Azcarraga's personal reputation. As emphasized above and again, the limited prophylactic measures imposed upon Seven Hills are intended to prevent any future transgressions of 47 U.S.C. §310(b). To the extent that these conditions have any slight impact on the petitioners, they are necessary and incidental to the Commission's statutory responsibilities, responsibilities that invariably affect the scope of activities of those subject to federal regulation. [4] As we stated in our *Seven Hills* decision, "we believe that the Commission clearly has authority in a licensing action, an action prospective by its very nature, to condition a license renewal in a manner that protects the statutory policy inherent in 47 U.S.C. §310(b)(3)."

6. Finally, we note in passing that we have previously rejected attempts by various other nonparties to participate both in the original and the residual license renewal proceedings, where those nonparties failed to meet the7 U.S.C requisite standards prescribed by Sections 1.106 and 1.223 of the Commission's Rules. *See Seven Hills*, 2 FCC Rcd at 6889; *Spanish International*, 1 FCC Rcd at 95-96 n.14. The same treatment shall obtain here. *Lex uno ore omnes alloquitur.*

7. ACCORDINGLY, IT IS ORDERED, That the Joint Petition for Partial Reconsideration filed December 14, 1987 by Univision, Inc. and Emilio Azcarraga Milmo IS DISMISSED; and that the motion to dismiss the joint petition for partial reconsideration filed December 23, 1987 by the Mass Media Bureau IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The larger case, involving all licenses except those held by Seven Hills, was settled prior to review of the initial decision of an FCC ALJ. *See* 1 FCC Rcd 92 (Rev. Bd. 1986), *recon. denied*, 1 FCC Rcd 844 (Rev. Bd. 1986), *erratum*, 1 FCC Rcd 1036, *aff'd as modified*, 2 FCC Rcd 3336 (1987).

[2] Section 1.65 of the Commission's Rules, 47 CFR §1.65, requires an applicant to report within 30 days substantial changes in its application or any other matter that may be of decisional significance. In *Seven Hills*, we admonished Seven Hills for failing to file in a timely manner consulting agreements between SIN, Inc. and Seven Hills principals Rene Anselmo and William D. Stiles. 2 FCC Rcd at 6889.

[3] In point of fact, the Commission has on its books many regulatory restrictions concerning a broadcast licensee's relationship with network program suppliers (such as Univision). *See* 47 CFR §73.658. We do not deny that such regulatory restrictions do significantly constrain a licensee's "freedom of contract," just as Section 310(b) of the Communications Act prohibits any number of arrangements between licensees and foreign persons and entities. Such restrictions come with a broadcasting license, and no one - including Seven Hills - is *compelled* to accept a broadcast license.

[4] In passing, we are more than a trifle skeptical of petitioners' claims to "surprise" at the several prophylactic conditions imposed on the Seven Hills license renewal. Considering the prior participation of the petitioners in earlier phases of this case, the ALJ's conclusion that all original parties had collectively violated Section 310(b)(3) of the Communications Act, and his subsequent denial of license renewals to all of the implicated corporations "as they are presently structured," the current asseverations of surprise strike us as passionately insincere.

Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Harriscope of Chicago, Inc., *et al* a Joint Venture, d/b/a VIDEO 44 — **MM Docket No. 83-575** File No. BPCT-820802J9

For Renewal of License of Station WSNS-TV, Channel 44, Chicago, Illinois

and

MONROE COMMUNICATIONS CORPORATION Chicago, Illinois — **MM Docket No. 83-576** File No. BPCT-82ll0lKH

For a Construction Permit

ORDER

Adopted: February 11, 1988; Released: February 22, 1988

By the Review Board:

1. On February 3, 1988, Video 44 filed a motion to defer further proceedings which was opposed by Monroe Communications on February 10, 1988. We will deny that motion for the reasons set out below.

2. Video 44 seeks a deferral until the Commission acts on its petition for reconsideration in the *Subscription Video Services*, Gen. Docket 85-305, rulemaking proceedings. In that proceeding, Video 44 seeks a ruling that the principles announced there "will be applied to all cases pending at the time the decision was announced." Monroe Communications responds that, as Video 44 recognizes, the Commission has already made a "direct pronouncement" in response to our certification "concerning the renewal expectancy standard to be applied *in this case.*" Monroe also urges final resolution of this case.

3. In its Memorandum Opinion and Order, FCC 88-9, released January 22, 1988, the Commission stated that "this case is now ready for appropriate action by the Review Board." *Id.*, at para. 25. In view of that express order, we shall not defer further action. Instead we will expedite our own review function and issue a decision at the earliest possible date.

4. ACCORDINGLY, IT IS ORDERED That Video 44's motion to defer further proceedings IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-236

In re Applications of

SUSAN S. MULKEY	File No. BPCT-850320KF
KOONTZ COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPCT-850320KH
FAMILY 55 TV, INC.	File No. BPCT-850320KI
CATAWBA COMMUNICATIONS, INC.	File No. BPCT-850320KJ
NEISLER LIMITED PARTNERSHIP	File No. BPCT-850320LE
METROLINA MEDIA, INC.	File No. BPCT-850320LF

For Construction Permit
for a New Television Station
Rock Hill, South Carolina

ERRATUM

Released: February 22, 1988

The *Decision*, FCC 87R-72, released February 9, 1988 is corrected as follows:

Paragraph 5, line 16, change "*Telecor p. v.*" to "*Tel. Corp. v.*"

Paragraph 5, line 17, change "307 U.S. 125 (1934)" to "307 U.S. 125, 144-146 (1939)"

Paragraph 13, change "1264" to "1269"

Paragraph 20, line 20, change "nott" to "not"

Paragraph 20, line 20, delete "failure does not"

Paragraph 20, delete lines 21-24 in their entirety

BY DIRECTION OF THE REVIEW BOARD

Allan Sacks
Chief for Law

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-72
and CC Docket No. 80-286

MTS and WATS Market Structure

Amendment of Part 67 of the
Commission's Rules
Establishment of a Joint Board

MEMORANDUM OPINION AND ORDER

Adopted: February 10, 1988; Released: February 22, 1988

By the Chief, Common Carrier Bureau:

INTRODUCTION

1. The Office of Consumers' Counsel, State of Ohio (OCCO) has filed a petition for reconsideration of the July 1, 1987, Order of the Chief, Common Carrier Bureau, granting the Ohio Public Utilities Commission (PUCO) application for federal lifeline assistance.

2. OCCO requests that (1) any federal assistance be made retroactively available to the 1,042 United Telephone Company (United) customers who have participated in a telephone assistance program (TAP) since December 1985, and (2) lifeline connection assistance (Link-Up) benefits be made available to all qualifying participants in eight Ohio TAPs.[1] As grounds for its request, OCCO argues that lifeline customers should not be made to suffer for the "callous inaction" of PUCO and the FCC.

3. PUCO filed an opposition to OCCO's petition. PUCO does not object to retroactive grant of lifeline connection assistance, but realizes that there may be legal or administrative constraints, such as FCC policy that lifeline assistance can be provided only subsequent to approval of appropriate interstate tariffs.

BACKGROUND

4. On December 10, 1985, the Commission adopted the recommendations of the Federal State Joint Board in CC Docket Nos. 78-72 and 80-826 for an expanded federal lifeline assistance program in order to preserve universal service and to promote subscribership among low income households.[2] The program provides matching benefits, through waiver of the subscriber line charges established by our access charge rules,[3] to subscribers that receive benefits under a qualifying state or local telephone company lifeline assistance plan. The Commission's Order specifically provided that only state commissions or LECs would be permitted to apply for this federal assistance.[4]

5. PUCO authorized an experimental telephone assistance program (TAP) for eight local exchange carriers (LECs) on December 10, 1985. The TAP plans offer a waiver of the security deposit and a fifty percent reduction in the service connection charge to eligible participants.

6. On February 11, 1986, OCCO filed a petition for reconsideration of the Commission's Lifeline Order. OCCO requested that the Commission allow consumers and their "direct representatives" to apply to the Commission for federal lifeline assistance benefits because regulated telephone companies and PUCO were reluctant to implement lifeline assistance or opposed such programs outright. The Commission denied the OCCO petition.[5] Before such a plan can be certified by the Commission, final state approval is necessary, either through legislation, state commission rules or approval of local exchange carrier's tariffs.[6] The Commission found that allowing consumers or consumer groups to apply for certification would unduly complicate the certification process and create unnecessary administrative burdens, with no apparent benefit to the public.[7]

7. On February 2, 1987, OCCO filed a petition for waiver and application for lifeline benefits. OCCO requested that the Commission waive Section 69.203 of the rules, which limits application for matching federal lifeline benefits to state commissions and LECs, and grant OCCO's application for such benefits on behalf of customers participating in the United TAP. The grounds offered by OCCO were that United and PUCO were reluctant to implement lifeline assistance and opposed the program. The Commission denied the petition for waiver and application as repetitive of the OCCO February 1986 petition for reconsideration.[8] OCCO presented no evidence that the Commission's certification policy was not serving its intended purpose in Ohio. The Commission reiterated that the federal lifeline assistance program as originally established properly delegates the responsibilities of applying for federal benefits to those parties that are responsible for developing and implementing the plans.[9]

8. On May 20, 1987, PUCO applied to the Commission for matching federal lifeline assistance benefits, pursuant to FCC Rules and Regulations, Section 69.203.

DISCUSSION

9. OCCO's present petition for reconsideration is repetitious of both its prior petition for reconsideration and its petition for waiver. OCCO presents no facts to support its request for reconsideration. OCCO presents no new argument which warrants reconsidering the Bureau's grant of PUCO's request for prospective lifeline assistance. Nor does OCC demonstrate any public interest in contravening explicit Commission policy and orders.

CONCLUSION

10. Accordingly, IT IS ORDERED, that the OCCO petition for reconsideration is DISMISSED, pursuant to FCC Rules and Regulations, Sections 1.106(a)(1), 1.106(k)(3), and 1.429(i).

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] This request has been mooted by grant of the September 23, 1987, PUCO application for Link-Up assistance. PUCO was granted federal lifeline connection assistance for all Ohio LECs who submit local service tariffs complying with Commission criteria for eligibility. Letter from Gerald Brock, Chief, Common Carrier Bureau, dated October 1, 1987, to Brian L. Pendleton, Senior Analyst, PUCO.

[2] MTS and WATS Market Structure, CC Docket Nos. 78-72 and 80-286, FCC 85-643 (released December 27, 1985), 51 Fed. Reg. 1371 (January 13, 1986) (Lifeline Order).

[3] FCC Rules and Regulations, Section 69.203.

[4] MTS and WATS Market Structure, CC Docket Nos. 78-72 and 80-286, Lifeline Order, para. 9.

[5] MTS and WATS Market Structure, CC Docket Nos. 78-72 and 80-826, FCC 86-467, 1 FCC Rcd 431 (November 5, 1986) (Lifeline Reconsideration).

[6] *Id.*, para. 7.

[7] *Id.*

[8] MTS and WATS Market Structure, CC Docket Nos. 78-72 and 80-286, FCC 87-237, 2 FCC Rcd 4533 (August 3, 1987), para. 8.

[9] Id., para. 9.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 85-166
Phase I

In the Matter of

Investigation of Special Access
Tariffs of Local Exchange Carriers

MEMORANDUM OPINION AND ORDER

Adopted: February 4, 1988; Released: February 8, 1988

By the Chief, Common Carrier Bureau:

1. The Association of Independent Television Stations, Inc. (INTV) has filed a motion for extension of time in the above-captioned proceeding. In its Order released November 9, 1987,[1] the Common Carrier Bureau (Bureau) determined that all television access user parties to this proceeding[2] should file with the Commission within 30 days of the release of the *Refund Order* their claims for refund. INTV and the National Association of Broadcasters (NAB) requested that the time for complying with that requirement be extended 60 days so that they would have sufficient time for the preparation of their claims. Each noted that it was comprised of a large membership, and that data requests, collection, analysis, and preparation would require considerable time and effort. In an Order released on January 12, 1988,[3] this Bureau granted their request, and established February 9, 1988 as the due date for these claims. Now INTV has requested a further 30-day extension.

2. INTV states that in the interest of streamlining the refund process, it is undertaking to collect individual claim information from its more than 180 members and to present appropriate claims on their behalf to this Bureau. INTV states that this process is time-consuming but worthwhile, and that its claim will be more useful and reliable if it has more time to ensure that the calculations it presents are fully appropriate and accurate. INTV states that no party has opposed its right to receive refunds in this proceeding, that no party will be harmed by a grant of its motion, and that the extension of time requested here would essentially serve the interests of all parties.

3. We find that INTV has shown good cause for the requested extension of time, and that a grant of this 30-day extension will not harm any party.

4. Accordingly, IT IS ORDERED that the motion for extension of time of the Association of Independent Television Stations, Inc. to March 9, 1988 for the filing of refund claims in the above-captioned proceeding IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, Memorandum Opinion and Order, 2 FCC Rcd 6847 (1987) (*Refund Order*).

[2] The parties include Capital Cities/ABC, Inc., CBS Inc., National Broadcasting Company, Inc., Hughes Television Network, and the National Association of Broadcasters, in addition to INTV.

[3] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, DA 88-11, released Jan. 12, 1988 (*January 12 Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

Released: February 18, 1988

ALC COMMUNICATIONS CORPORATION AND MCI TELECOMMUNICATIONS CORPORATION FILE PETITIONS FOR DECLARATORY RULING REGARDING ALTERNATIVE EQUAL ACCESS ARRANGEMENTS

PLEADING CYCLE ESTABLISHED

On January 29, 1988, ALC Communications Corporation (ALC) filed an emergency petition for declaratory ruling asking the Commission to find that use of alternative access arrangements which degrade services and/or provide the BOCs with preferential intraLATA access is unlawful. Also on that date, MCI Telecommunications Corporation (MCI) filed a petition for declaratory ruling requesting the Commission to declare that exchange carriers cannot assess premium access charges for an access service that is subject to access delay significantly in excess of that associated with current "non-alternative" Feature Group D service.

On December 29, 1987, the Common Carrier Bureau issued an Order[1] regarding an alternative equal access arrangement proposed by US West. In that Order, the Bureau expressed concern about the additional post-dial delay caused by the proposed technologies, but allowed the US West proposal to take effect, based on US West's estimates of the expected post-dial delay. The Bureau required US West to submit a report on July 1, 1988, regarding the actual amount of post-dial delay experienced by users. The Bureau stated that if the report reveals a significant deviation from US West's delay estimate, the Bureau will consider further action.

In its petition, MCI observes that there has been a recent flurry of alternative equal access proposals by other local exchange carriers. MCI argues that the Bureau should review and decide the appropriateness of these arrangements prior to their implementation, instead of waiting for the July 1, 1988 report. ALC states in its petition that the real question raised is not whether these arrangements introduce significant post-dial delay, but whether it is unjust and unreasonable to impose service degradation for premium access, and whether it is discriminatory to route only interexchange carrier calls (not local exchange carrier calls) through these alternative devices.

Interested parties may file comments regarding these petitions no later than **March 9, 1988.** Reply comments may be filed no later than **March 24, 1988.**

Copies of the petitions may be obtained from the Commission's contract copier, International Transcription Service, Inc. (ITS), Room 246, 1919 M Street, N.W., Washington, D.C. 20554. Copies of the Petitions are also on file and available for public inspection in the Tariff Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W. An original and five copies of all comments and replies must be filed, in accordance with Section 1.51(c) of the Commission's Rules. In addition, one copy of each comment or reply must be filed with ITS.

For further information, contact Linda Goodman, Tariff Division (202) 632-6917.

FEDERAL COMMUNICATIONS COMMISSION

FOOTNOTE

[1] Alternative Equal Access Arrangements, Mountain Ststes Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company, Tariff F.C.C. No. 1, Transmittal No. 104, DA-1887, released Dec. 29, 1987, *recon. pending*, US Sprint Petition for Reconsideration filed January 29, 1988.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 78-72
Phase I

In the Matter of

MTS and WATS Market Structure:
Average Schedule Companies

MEMORANDUM OPINION AND ORDER

Adopted: September 26, 1986;Released: September 30, 1986

By the Commission:

I. INTRODUCTION

1. On April 11, 1986, we adopted the *Average Schedule Order,* which approved certain revisions to the average schedules proposed, pursuant to our direction, by the National Exchange Carrier Association ("NECA"), effective June 1, 1986.[1] Several petitions have been filed seeking reconsideration, waiver, or declaratory relief with respect to various provisions of that *Order.* We here grant ALLTEL Corporation's petition for reconsideration to the extent that it requests that we entertain waiver requests concerning the conversion of average schedule companies to cost status pursuant to Section 69.605(c)(1) of our rules. We deny the petition for reconsideration filed by Telephone Data Systems, Inc. ("TDS") seeking modification of Section 69.605(c)(1) of our rules, but we will consider limited waivers of the rule's application when cost companies acquire average schedule companies if exceptional circumstances are shown. Finally, we deny the petition for declaratory ruling filed by the ICORE Telephone companies ("ICORE companies"), as well as the petitions for waiver filed by the Northwest Iowa Telephone Company ("Northwest Iowa") and the Jefferson Telephone Company ("Jefferson"). We are, however, permitting small average schedule companies[2] that would experience reductions in settlements under the revised average schedules to elect to defer the application of the revised average schedules to August 1, 1986.[3]

II. BACKGROUND

2. Average schedules have long been available for the convenience of exchange carriers "that have been assumed, because of their small size, not to have sufficient financial resources or expertise to justify a requirement that they perform jurisdictionally separated cost studies for determining their compensation in originating and terminating interstate telecommunications services."[4] No exchange carrier is required to utilize the average schedules for compensation. Any exchange carrier that believes that the average schedules do not provide appropriate compensation is entitled to be fully compensated on a cost basis.

3. In 1983 we decided that average schedule companies, like cost companies, should no longer be compensated for their interstate non-traffic-sensitive (NTS) plant according to measures their varied with traffic. We therefore directed NECA by rule to prepare and like revised average schedules to end the compensation of average schedule companies for NTS plant largely on the basis of the number of interstate messages that they carried.[5] We also required in Section 69.605(c)(1) of our rules that there be no "mixed compensation" arrangements, *i.e.,* that affiliated exchange carriers settle either on a cost basis for all companies or on an average schedule basis for all companies.[6] In affirming in principal part our access charge plan in 1984, the Court of Appeals questioned whether we had an adequate basis for concluding that a very small average schedule company would have the resources to perform cost studies because it was affiliated with a very small cost company.[7] In response to the Court's concerns, we instituted a notice of proposed rulemaking to re-examine whether the mixed compensation prohibitions should be retained,[8] waived the application of those prohibitions until the re-examination had been completed,[9] and subsequently concluded that those prohibitions should not become effective until January 1, 1988.[10]

4. In September 1985, NECA filed modifications to the average schedules to implement a substantial portion of our directive.[11] NECA proposed, among other things, to "flash-cut" average schedule companies receiving more than 85% of their total NTS revenue requirement (intrastate and interstate) from interstate average schedule compensation, so that they would receive no more than 85% of that requirement from the interstate average schedules. The NECA proposal also contained a four-year transition plan for average schedule companies that, after application of the 85% NTS revenue requirement "flash-cut," would otherwise experience a reduction in settlements in excess of $1.25 per access line per month. For companies subject to such reductions, NECA proposed that access line settlements would decrease each year by $1.25, or less, per access line per month, through the fourth settlement year, until those payments were equal to the level of access line payments contained in the revised average schedules. Thus the transition would be complete during the fourth year for average schedule companies experiencing a net reduction in total settlements of $5.00 or less per access line, per month.[12]

5. In the *Average Schedule Order,* we approved NECA's proposed revisions to the schedules and specifically found that its flash-cut provision was not unjust or unreasonable.[13] We reaffirmed our prohibitions against mixed compensation arrangements, but modified our rules: (1) to postpone the effective date of the mixed compensation prohibitions until January 1, 1988; and (2) to apply Section 69.605 (c)(1) only to affiliated exchange carriers with $40,000,000 or more in annual operating revenues.[14]

III. THE PETITIONS

A. The ALLTEL Petition for Reconsideration

1. The Petition

6. In its petition, ALLTEL reiterates its support for the revisions to the average schedules, but requests two modifications that would affect the conversion of average schedule companies to cost status pursuant to the require-

ment under Section 69.605(c)(1) of our rules that the compensation of all affiliated companies with $40,000,000 or more in annual operating revenues occur either on a cost basis or according to the average schedules.

7. ALLTEL first requests that the Commission adopt a 25% interstate gross allocator for non-traffic-sensitive ("NTS") plant for companies whose initial cost studies produce a SPF below that level. ALLTEL argues that "expanded use of EAS, use of EAS facilities for toll use, Feature Group A and Feature Group B usage, and traffic diverted to facilities-based resellers may not be recognized in the [SPF] allocation factor. Therefore, the initial study area SPF could be significantly understated, resulting in adverse impacts to local ratepayers." Basically, ALLTEL is concerned that current traffic measurements may generate a SPF that is lower than that which would have been produced by traffic data for 1981, the year at which cost company SPFs were frozen. ALLTEL contends as well that the 25% basic allocator is "in line with the current approximately 25-26% SPF being used for the current average schedules interstate."[15]

8. ALLTEL also requests that we state that we "will entertain requests for waiver of the affiliated carrier restriction where the carrier has been diligent in making all necessary preparations for converting from average schedule to cost."[16] In support of its request, ALLTEL states that the conversion of average schedule companies to cost study status may require significant improvements in company recordkeeping. Therefore, it believes that it may not be possible to assemble adequate "Company Property Records" for all affiliated average schedule companies in time to meet the January 1, 1988 deadline.[17]

9. In opposition, AT&T stated: (1) that ALLTEL's petition is procedurally deficient in that it really seeks a change in Part 67 of the Commission,s rules rather than reconsideration of the *Average Schedule Order;* (2) that ALLTEL's petition is without substantive merit since it "seeks a modification of the rule so that the SPF for converting companies would be the initial study period amount or 25 percent, whichever is higher"; and (3) that it would be inequitable to accord a "special and unjustified preference to one class of LECs -- newly converting cost study companies --while all other LECs with SPF's below 25 percent must, by FCC rule, move to 25% over an 8-year period."[18]

2. Discussion

10. We do not believe that ALLTEL has made a sufficient showing to justify modifying our rules to permit all average schedule companies converting to cost status in order to satisfy the requirements of Section 69.605(c)(1) to employ an interstate allocation factor of at least 25%. It is not clear, for example, that the loss of traffic recorded as interstate toll traffic because of the factors ALLTEL cites has not been offset in whole, or in substantial part, by the general increase in interstate calling volumes that has occurred since 1981.[19] As a result, it is unclear whether or to what extent the application of our rules will cause undue hardship. We will, however, consider whether further proceedings are required to prevent anomalies in the transition from average schedule to cost company status by companies subject to the Section 69.605(c)(1) if we receive carefully documented petitions that demonstrate the need for further review.

11. We believe that ALLTEL's second, more limited, request has merit. Accordingly, we will consider requests for temporary limited waivers of the January 1, 1988, deadline for conversion of all affiliated companies to cost status pursuant to Section 69.605(c)(1). Such waiver requests must be accompanied by specific evidence that clearly establishes that the petitioner has made every reasonable effort to comply with the rule.[20]

B. The TDS Petition for *Reconsideration*

1. The Petition

12. TDS requests that we modify Section 69.605(c)(1) so that "small, rural, average schedule companies owned in common with on; or more cost companies will not be forced to become cost companies simply because the collective annual revenue for the companies and all their affiliates is at least $40 million."[21] TDS states that 17 of its 62 small, rural telephone company affiliates are interstate average schedule companies and that the total annual revenue for all affiliates exceeds $40 million. TDS notes that "it is TDS' practice, for corporate reasons and to maintain the local nature of the company, to retain the separate operations and corporate status" of each company that it acquires. According to TDS, the $40 million benchmark discriminates against it because there is no valid reason not to exempt all "similarly situated small and rural study areas (regardless of their aggregate earnings)" from the requirement that all affiliated companies settle on a cost basis or according to the average schedules. In support, TDS argues that this Commission has not adequately articulated why a $40,000,000 or larger holding company should be considered capable of performing, or having performed, cost studies to substantiate the interstate compensation that should be received by its affiliates, that the $40,000,000 cut-off is "entirely arbitrary,"[22] and that Section 69.605(c)(1) improperly interferes with management decisions about whether to keep a newly acquired company as a separate corporation.[23]

13. TDS argues in the alternative that, if we decline to make the requested modification to Section 69.605(c)(1), we should amend the rule in three respects. First, TDS suggests that the rule not apply to small rural companies until January 1, 1989, so that additional separations personnel and related resources can be added "in a rational and economically efficient way." Second, TDS asks that we "allow at least two years for conversion of any rural average cost company acquired in the future by subset one or two company." Third, TDS requests that we adopt the first modification requested by ALLTEL -- that is, that we "grandfather" all small average schedule companies being converted to cost status so that their interstate SPF equals at least the 25% interstate allocator.[24]

2. Discussion

14. We conclude that no modification of our rules is appropriate with respect to the concerns raised by TDS. TDS contends that we have not adequately articulated why we have concluded that a holding company with $40 million or more in annual operating revenues should have the resources to perform, or to have performed, interstate cost studies for its average schedule affiliates. To address the concerns expressed by the Court of Appeals, we amended the application of our mixed compensation prohibition so that it would apply to an average schedule company affiliated with one or more cost companies only

when sufficient resources existed to provide for the studies necessary to convert that company to cost status.[25] We decided that $40 million in annual operating revenues for all affiliated companies would adequately address the concerns of the Court, especially because the reasonable costs of interstate studies for average schedule companies that convert to cost company treatment are fully compensable from interstate ratepayers as allowable expenses. It is, of course, possible to argue that annual revenues lower than $40 million would ensure sufficient resources in most situations. However, because $40 million in annual operating revenues (the demarcation point between subset 2 and subset 3 companies used in determining NECA representation)[26] will be an adequate indicator of sufficient resources in virtually all instances and because there will be no additional administrative costs in classifying carriers according to this measure because that classification is already applied in the representational structure of the NECA Board, we again conclude that Section 69.605(c)(1), as amended in the *Average Schedule Order*, is an appropriate exercise of our administrative discretion.[27]

15. That conclusion does not mean, of course, that waivers of this requirement might not be appropriate in particular circumstances. TDS, however, has not established that it does not have sufficient resources or expertise, among its 62 companies, to perform the requisite studies, particularly since more than two-thirds of its affiliates are already performing interstate cost studies.[28] We will consider, and request public comment upon, specific waiver requests from holding companies that are subject to Section 69.605(c)(1) that demonstrate an unreasonable burden in light of:

> (1) audited financial statements (*i.e.*, income, balance sheet, and changes in working capital statements) for each holding company and each of its affiliates for the preceding fiscal year;
>
> (2) reliable estimates of the expenses that are associated with performing cost studies for each average schedule affiliate that would otherwise be required to convert to cost study status;[29] and
>
> (3) attested statements that demonstrate that the management and other personnel of the affiliated companies and the holding company are not available to perform studies that are necessary to receive interstate cost compensation.[30]

16. We likewise do not believe that the alternative rule modifications requested by TDS are appropriate. TDS has not demonstrated that an additional year of delay would be warranted, and it does not otherwise appear that an additional year should be necessary.[31] The rules at issue were adopted and released in 1983, and were to become effective January 1, 1986.[32] On April 18, 1986, we released the *Average Schedule Order* that extended the effective date of the rule to January 1, 1988. We believe that this has provided TDS with sufficient opportunity to prepare the necessary studies and make the necessary elections. It is unlikely that an additional year will yield benefits sufficient to offset the interest of interstate ratepayers in having the rule applied on January 1, 1988.

17. We also decline to modify our rules to allow a two-year conversion period for any average schedule company that is acquired by a subset one or subset two company.[33] TDS has not shown why two years, or even one year, are necessary to convert an average schedule company to cost company status.[34] We anticipate that the timing of cost studies and dates of corporate acquisitions will, in many cases, be scheduled so that both can be consummated at the same time.[35] In addition, given the application of section 69.605(c)(1), we find it somewhat implausible that a subset 1 or subset 2 company would acquire an average schedule company without having undertaken an analysis, prior to acquisition, of the cost-based settlements that the average schedule company would receive after conversion to cost treatment. We will, however, consider requests that are based upon exceptional circumstances that may justify granting a waiver for a limited period of time.[36]

C. The ICORE Companies' Petition for Declaratory Ruling

1. The Petition

18. On May 27, 1986, the ICORE local exchange companies[37] filed an emergency petition for declaratory ruling[38] seeking to have this Commission declare that "average schedule settlements for WATS access facilities will continue to be paid under the current ARPM [Average-Revenue-Per-Message] methodology until new average schedule special access formulas are approved by the Commission."[39] The ICORE companies contend that our decision requiring that WATS closed-end lines be treated as special access lines, instead of common lines, should not be applicable to average schedule companies because NECA "never proposed" the use of the special access line portion of the average schedules to compensate average schedule companies for WATS closed-end access lines.[40] The ICORE companies further contend that we must receive and approve a recommendation from NECA for the special access treatment of the closed-end of WATS lines before the average schedule special access rate treatment can be applied to average schedule companies with closed-end WATS lines.[41]

2. The Positions of the Parties

19. NECA, the National Telephone Cooperative Association ("NTCA"), and the Organization for the Protection and Advancement of Small Telephone Companies ("OPASTCO") oppose the ICORE companies' petition. In part, NECA argues that this Commission's orders require the change in compensation for WATS access lines provided by average schedule companies:

> The current average schedule provides for settlements for special access. By operation of the Commission's decision in CC Docket No. 86-1, redefining WATS closed ends as special access, this special access schedule necessarily applies to WATS closed ends.[42]

According to NECA, because we had already required that WATS closed-end lines be treated as special access lines, it would have been a meaningless formality for NECA to propose the treatment of WATS closed ends that this Commission had already required.[43] NTCA and OPASTCO concur in that assessment, arguing that NECA was not required to propose revisions to the special access schedules to the closed-end of WATS lines.[44] NTCA and

OPASTCO also contend that the ARPM methodology is invalid and should not be used even on a transitional basis;[45] that the closed end of WATS lines should be treated in the same manner as any other special access lines;[46] and that no harm will result from the use of the current special access schedules that would justify "reviving the APRM Method."[47]

3. Discussion

20. We agree with the parties who contend that the ICORE companies' request is without merit. First, contrary to ICORE's assertion, it was not necessary for NECA to notify this Commission that the treatment of WATS closed-ends as special access lines for purposes of jurisdictional separations and access charges would change average schedule company compensation for those lines. Our Notices of Proposed Rulemaking and Orders regarding the direct assignment of WATS closed-end lines and concomitant changes in access charges contemplated that all WATS access lines would be treated as special access lines, and made no special exception for WATS access lines provided by average schedule companies.[48] The regulation quoted by the ICORE companies merely applies when NECA initiates revisions in the terms or conditions of the average schedules themselves. It is not, as such, applicable when no such revisions are required, or when this Commission makes underlying changes in classifications that move costs from one category to another within the average schedules. Second, the ICORE companies have not demonstrated that treatment of WATS closed-ends as special access lines under the special access schedules is otherwise inappropriate pending receipt of the revisions to the line haul and special access schedules that we have required NECA to file. Third, the ICORE companies have not demonstrated that there are sufficient benefits to the public[49] to support a reversion to the ARPM methodology for the closed-end of WATS lines.[50] Accordingly, the ICORE companies emergency petition for declaratory ruling is denied.

D. The Northwest Iowa Telephone Company Petition

1. The Petition

21. The Northwest Iowa Telephone Company[50] ("Northwest Iowa" or "Northwest") seeks entry of an order "waiving the application to Northwest, through January 1, 1988, of any rule or procedure altering the average schedule settlements process in place prior to June 1, 1986" on the grounds of the "extraordinary hardship that will be suffered by Northwest, and the communities it serves, if the waiver is not approved."[51] In support of its petition, Northwest Iowa argues primarily that NECA's proposed revisions to the average schedules "gave companies little or no time to adjust to the dramatic revenue reductions imposed by the "flashcut' and three-year transition" and that Northwest faces severe losses under the revised schedules "because it made long-term business and investment decisions in good faith reliance on the then-existing settlements methodology." Because of these circumstances, Northwest argues that the revised schedules "will cause [it] to become extremely unprofitable over the next eighteen months"[52] even though, "[g]iven time, Northwest could adjust its business plans and operations to account for the average schedule revisions." Northwest also argues that its "access customers can reconfigure their networks to eliminate reliance on Northwest, [but] doing so will take at least 6 to 8 months, and perhaps longer," and that 250 newly created jobs in a telecommunications center recently established by Northwest's parent in Sergeant Bluff, Iowa will be lost if the waiver is not granted.[53]

22. Northwest Iowa also complains that NECA has implemented two specific average schedule changes in contravention of this Commission's rules and without notice to Northwest. These changes, which NECA implemented as part of its revised set of Average Schedule Pool Adminstration Procedures distributed on May 23, 1986, include provisions that companies would not receive settlements for WATS traffic "unless the central office does the WATS/800 screening function" and that "outdated" average schedule special access formulas would be applied to settlements for WATS closed-end access lines. Neither of these changes, according to Northwest, has been reviewed or approved by this Commission pursuant to 47 C.F.R. §69.606(b).[54]

2. The Positions of the Parties

23. In response to Northwest Iowa's principal contentions that NECA's plan did not give it adequate notice or an opportunity to adjust its business planning, and that as a result Northwest made long-term business and investment decisions in good faith reliance on the then-existing settlements formula for average schedule companies,[55] NTCA states, *inter alia:*

> Northwest fails to show that in fact such reliance was proper or prudent or that the investment decisions were appropriate. ... Northwest's statement is apparently predicated upon the proposition that somehow, it is entitled to the continued existence of selected business conditions that are to its benefit. However, neither Northwest nor any exchange carrier enjoys such a guarantee. ... Northwest also must show why it did not know, or should not have known, that the process was likely to change. It cannot make this showing since knowledge that changes to the average schedule settlements process were in the cards from the date the original of 47 c.F.R. §69.606(a) was proposed. This rule was adopted in relevant form in early 1983, so this knowledge was generally apparent since at least that time.. .. The fundamental point here is that Northwest knew or should have known changes would be occurring, and perhaps should have evaluated large-scale investment decisions in that light.[56]

24. In response to Northwest Iowa's complaint about settlements for WATS traffic that an average schedule company does not switch, NECA confirms that its "proposed average schedule revisions which the Commission approved, calculate settlements only for those minutes which are switched by an average schedule company."[57] NTCA notes that Northwest Iowa does not function as a WATS screening office -- that is, it provides no switched access screening services with respect to WATS traffic,[58] a point that Northwest does not contest in its reply.

3. Discussion

25. We concur in NTCA's assessment that Northwest Iowa has not shown that its asserted reliance on the continuation of the then-existing average schedule com-

pensation arrangements was prudent or reasonable. Not only was Northwest on notice of planned changes in those arrangements from early 1983, but the principal officers of Northwest Iowa's holding company (Long Lines, Ltd.) also were present during discussions at the Average Schedule Task Group Meeting in Washington, D.C. on December 13, 1984, which considered changing the common line portions of the average schedules from an ARPM basis to a "per access line settlements vehicle," effective on *January 11 1985*. [59] In fact, the proposed revisions that we actually approved in the *Average Schedule Order* became effective on June 1, 1986 fully seventeen months after the January 1, 1985 date that had been discussed with the officers of Northwest Iowa's holding company on December 13, 1984, and more than three years after the access charge decision was published in the Federal Register during March 1983.[60] As a consequence, we conclude that Northwest Iowa did, in fact, have adequate notice that the average schedule settlement methodology was to be changed and that it chose to assume the business risks that were associated with its collateral enterprises.[61]

26. We also do not believe that the changes included in NECA's revised administration procedures were improper in any respect or constitute grounds for waiver. As we explained above, the application of the special access average schedules to WATS closed-end access lines was the direct result of our orders in CC Docket No. 86-1.[62] With respect to the provision of compensation for WATS traffic-sensitive costs, Northwest appears to be contending that under the revised average schedules it is, or should be, entitled to receive traffic-sensitive switched compensation for WATS traffic that it does not actually switch or screen. We do not perceive a justification for such an approach, and Northwest provides no explanation. The result Northwest seeks, if it were included in the current average schedules, would be an anomaly that we would require NECA to justify or eliminate.[63] Accordingly, we conclude that we should deny Northwest Iowa's petition.

E. The Jefferson Telephone Company Waiver Petition

1. The Petition

27. As explained above, while the average schedule revisions we approved in the *Average Schedule Order* include a multi-year transition for companies that would experience reduced levels of compensation under the new methodology, those revisions also provide for a "flash-cut" change in the common line settlement for average schedule companies with abnormally high interstate message volumes so that no company would receive more than 85% of its total NTS revenue requirement from the interstate average schedules.[64] The Jefferson Telephone Company ("Jefferson") seeks a waiver of this "flash-cut" treatment.[65] In support of its request, Jefferson makes two basic arguments: (1) that despite NECA's determination that it "recovers in excess of 85 percent of its total NTS costs from its interstate common line settlement revenues," it actually recovers only 60 percent of its NTS costs in this fashion and therefore should not be subject to the flash-cut;[66] and (2) that "the transition to the new average schedules threatens [its] existence in the near term, and the availability of reasonably priced local-telephone service in both the near and Long term."[67]

28. According to its petition, Jefferson is a small telephone company with 410 residential subscribers and 40 business customers in a rural portion of the southeastern tip of South Dakota.[68] Its rates for Local exchange service "are fairly low," amounting to $6.00 per month for "town customers" and $8.50 per month for "country customers."[69] In 1984, total operating revenues were $272,028; in 1985, total operating revenues rose to $277,239. Based upon financial statements compiled by its accountants, Jefferson asserts that it experienced a drop in "net operating income" from $29,708 (1984) to $9,972 (1985). This drop in income was attributable in large part to Jefferson's decision to purchase certain "key man, insurance policies.[70] Jefferson contends that, because of its small size, it cannot justify the expenses that would be associated with cost studies ($10,000 to $15,000 initially, and $3,000 per year thereafter).[71]

29. Jefferson first contends that it should not be subject to the flash-cut because it allegedly is recovering its NTS costs from the average schedule settlements "at a rate well below 85 percent."[72] Jefferson states that it received three settlement impact statements from NECA between June 1985 and January 1986 that, although conflicting in some respects, consistently informed it that "its settlements would be flash cut from their current level -- based on an average interstate message volume of approximately 23 interstate messages per line per month -- to an amount Jefferson would recover if it carried only 15.9 interstate messages per line average."[73] Jefferson contends, however, that the expert analysis of the company's financial data submitted with its petition demonstrates that it recovers through the interstate average schedules well below the 85% threshold for the application of the flash cut:

> Jan Reimers, an expert with 18 years experience in the formulation and administration of average schedules as well as cost separations studies, calculated Jefferson's total NTS cost recovery using Jefferson's actual financial data and found that it is recovering only about 60 percent of its NTS costs from the average schedules. The calculation performed [b]y Mr. Reimers relies, in every important respect, entirely on methods used routin[e]ly by NECA and actual Jefferson financial information. In contrast, NECA determined that Jefferson is "overrecovering" based on a formula applied to estimates derived from aggregate data and without the benefit of *any* actual Jefferson financial data.[74]

30. Jefferson also argues that the flash cut will have serious financial impacts on the company and on its provision of reasonably priced local service. According to Jefferson, the "flash-cut" will reduce its interstate settlements by more than $36,000 per year, with the consequence that it "can not stay in business for more than six to twelve months."[75] Jefferson further contends that it cannot raise local rates or convert to cost status in response to these reductions. According to Jefferson, it would have to raise its local rates $8.00 per line per month to offset its losses during the first year, with $6.75 being attributable to the flash cut -- increases that its rural customers cannot bear. Conversion to cost status is not possible because of the time required to prepare the necessary studies and to obtain the required approvals.[76]

31. Jefferson maintains that approval of the requested waiver would permit it to explore possible solutions, including the feasibility of converting to cost status. "It could also take advantage of average schedule revisions

that may be offered by NECA in 1987 that better compensate companies like Jefferson whose per line costs are well above average."[77]

2. Discussion

32. For reasons that we discuss *infra,* we conclude that Jefferson has not adequately documented its contention that it has been incorrectly classified and should not be subject to the flash-cut. Jefferson has, however, raised factual questions with respect to its operations that merit further investigation. Pending the completion of that investigation, we will stay the application of the flash-cut to Jefferson.[78]

33. Jefferson's support for its contention that it has been misclassified and should not be subject to the flash-cut primarily consists of the affidavit of Mr. Reimers.[79] In his affidavit, Mr. Reimers calculates Jefferson's total unseparated *(i.e.,* intrastate plus interstate) NTS revenue requirement for 1985 based upon Jefferson's financial statements as well as "estimated 1985-Common Line (NTS) Settlements." Based on these estimated amounts, Mr. Reimers computes a ratio for the purpose of demonstrating that Jefferson was recovering only 60 percent of its total NTS revenue requirements from the interstate average schedules. In addition, Mr. Reimers estimates that Jefferson's SPF [80] is 0.5999, based on calculations appended to his written testimony. Mr. Reimers concludes that Jefferson was misclassified and should not be subject to flash-cut treatment as an average schedule company.

34. We cannot conclude that Mr. Reimers' data or methodologies provide a sufficient detailed basis for accepting his conclusions at face value. First, the data in Jefferson's financial statements on which Mr. Reimers relies do not appear to be of the type generally suited to such a purpose. The opinion letter prepared by Jefferson's Certified Public Accountants to describe these data clearly states that these financial statements represent a compilation, and not an audit, of the company's financial records.[81] As the opinion letter notes:

> A compilation is limited to presenting in the form of financial statements information that is the representation of management. *We have not audited or reviewed the accompanying financial statements and other additional information, and accordingly, do not express* any *opinion or any other form of assurance on them.* [82]

The accountants also include in their opinion letter another qualification that affects the reliability of the data on which Mr. Reimer rests his opinions:

> Management *has elected to omit substantially all of the disclosures and the statement of changes in financial position required by generally accepted accounting principles.* If the omitted disclosures were included in the financial statements, they might influence the user's conclusions about the Company's financial position, results of operations and changes in financial position.[83]

35. Second, Mr. Reimer's SPF calculation of .5999 is heavily dependent upon unsupported assumptions for the values of four critical numbers -- length of each intrastate message, number of minutes of local [intrastate] exchange usage per access line, interstate Composite Station Ratio ("CSR") and intrastate CSR.[84] Those assumed values are sufficiently uncertain as to merit further investigation.

36. The estimates and assumptions underlying the supporting data for Jefferson's petition require further investigation to determine whether they form a sufficient basis for taking further action. In sum, although we have concluded that Jefferson's petition does not adequately document its contentions, we also have concluded that it raises sufficient issues to warrant further investigation. As noted above, we have decided to undertake such an investigation in order to determine whether further action is required.

F. Further Adjustments to the Application of the Average Schedule Revisions

37. Although have declined to grant Jefferson the remedies that it seeks,[85] we are not unmindful of the legitimate concerns of small exchange carriers throughout the United States during this transitional period in which the industry has been adjusting to a number of dramatic changes. It is important to recognize that the divestiture of the Bell Operating Companies, the implementation of cost-based access charges, and related changes in jurisdictional separations have revenue requirement implications that need to be addressed not only through re-targeted rates for intrastate purposes, but also through careful cost analyses in an interstate settlements context.

38. We have attempted to provide sufficient notice and adequate lead time for small exchange carriers, such as Jefferson, to make necessary adjustments. The Modification of Final Judgment that provided for the divestiture of the Bell Operating Companies was made public during the second week of January 1982. We published the access charge decision, that formed the basis for the revisions to the average schedules that small exchange carriers now face, in the Federal Register during March 1983. We reconsidered that decision, and published our reconsideration decision in the Federal Register during September 1983, and NECA was formed shortly thereafter. Since that time, numerous meetings have occurred among representatives of exchange carriers, telephone trade associations, and members of the NECA Board of Directors to determine the modifications that would be required to the average schedules to meet the requirements that are contained in our rules.

39. Although we are not prepared to promulgate the rule amendments or grant the waivers requested here, we are aware that very small carriers as a group may in fact be encountering some transitional difficulties. In light of the substantial changes in the exchange carrier industry discussed above, it is understandable that some small average schedule companies may not have been well prepared to adjust to the cumulative changes that have occurred, when judged by historical standards, within such a relatively short period of time.

40. Therefore, after further reflection, we have concluded that we should take two additional steps to ease this transitional process. First, we have decided to attenuate the rapidity with which settlements will be reduced for the smallest average schedule carriers which, for these purposes we define to be average schedule companies which, with all affiliates, have fewer than 5,000 local subscriber access lines (hereinafter, "small average schedule companies").[86] As a consequence, we will permit small

average schedule companies to elect to waive the application of the average schedule revisions[87] through July 31, 1986.

Second, we note that NECA is in the process of developing and implementing new procedures to facilitate the conversion of average schedule companies to cost status so that average schedule companies, with reliable financial data, can receive cost-based compensation more quickly.[88] We direct that those procedures permit small companies, who elect to "go cost" by December 1, 1986, to elect to be compensated on a cost basis from August 1, 1986. We believe that these steps should alleviate any transitional difficulties experienced by small average schedule companies, as well as facilitate the adjustments that small average schedule companies may be required to make with respect to local service rates, intrastate toll settlements, and conversion to cost status, without seriously impinging upon our broader goal of maintaining universal service throughout the United States at reasonable rates.[89]

III. ORDERING CLAUSES

41. Accordingly, pursuant to sections 1, 4(i)-(j), 201, 204, 205, and 208 of the Communications Act of 1934, IT IS ORDERED THAT the petitions of ALLTEL, TDS, the ICORE companies, Northwest Iowa, and Jefferson ARE GRANTED to the extent stated herein, and ARE OTHERWISE DENIED.

42. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i)-(j), 201, 204, 205 and 208 of the Communications Act of 1934, that small average schedule companies (as heretofore defined) that would otherwise have received reduced settlements may elect to be compensated until August 1, 1986 under the average schedules that existed on May 31, 1986.

43. IT IS FURTHER ORDERED, pursuant to sections 1, 4(i)-(j), 201, 204, 205, and 208 of the Communications Act of 1934, that small average schedule companies that elect by December 1, 1986, to be compensated on the basis of actual interstate costs may also elect to be compensated on the basis of those costs from August 1, 1986.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

FOOTNOTES

[1] Report and Order, In the Matter of MTS and WATS Market Structure: Average Schedule Companies, CC Docket No. 78-72, Phase I, FCC 86-177 (released April 18, 1986) ("*Average Schedule Order* ").

[2] For this purpose, "small average schedule companies" are defined to be those average schedule companies that, with all affiliates, have fewer than 5,000 common lines.

[3] It is our understanding that under the contracts and settlement procedures employed by NECA, average schedule companies have twenty-four months to "true-up" settlements before "booked" disbursements become final.

[4] *Average Schedule Order* at para. 2.

[5] *Id* . at para. 4.

[6] *Id* . at para. 5.

[7] National Ass'n of Regulatory Util. Comm'rs,. FCC, 737 F.2d 1095, 1128.

[8] Notice of Proposed Rulemaking in CC Docket No. 78-72, Phase I, FCC 84-604 (released Dec. 28, 1984).

[9] MTS and WATS Market Structure, CC Docket No. 78-72; Phase I, FCC 84-77 (released Mar. 9, 1984) (order granting waiver); MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, No. 1704 (released Dec. 27, 1985) (order waiving application of rule).

[10] *Average Schedule Order* at paras. 13-16, 19, Appendix.

[11] *Average Schedule Order* at para. 4.

[12] *See* NECA Proposed Modification of Average Schedules (filed Sept. 17, 1985) at 19-21, Appendix A at 11-12. NECA is studying companies that would experience a reduction in excess of $5.00 per access line per month in order to recommend appropriate treatment of those companies at the conclusion of the transition period. *See id.* at 19, n.11, 47 C.F.R. §69.606(a)-(b) (1984).

[13] *Average Schedule Order* at para. 12.

[14] *Id.* at para. 16, Appendix.

[15] ALLTEL Petition at 2. TDS makes a similar request as an alternative to its suggestion in its petition for reconsideration that subset 2 carriers be exempted from the requirements of Section 69.605(c)(1) of our rules. TDS petition at 8-9. *See infra* para. 13.

[16] ALLTEL petition at 3.

[17] *Id.*

[18] Opposition of the American Telephone and Telegraph Company at 1-4 (filed July 14, 1986). *See generally*, 47 C.F.R. §67.124(d) (1984).

[19] For example, AT&T observed in its opposing comments: "During the period 1981 to 1985, actual interstate use increased a total of over 40 percent, with the rate of growth in the last year 12.17 percent. *Order Designating Issues For Investigation*, Annual 1985 Access Tariff Filings, CC Docket No. 86-125, Phase I, released April 14, 1986, at Chart L, page 2, lines 1-9, column IX." Opposition of the American Telephone and Telegraph Company at 3, n**.

[20] Our evaluation of such requests will take into account the availability of less burdensome procedures for conversion of average schedule companies to cost status currently under development by NECA. *See infra* note 88.

[21] TDS petition at 1.

[22] TDS petition at 4.

[23] TDS petition at 5.

[24] TDS petition at 9.

[25] TDS argues that all small, rural exchange carriers are similarly situated, regardless of the aggregate revenues of all affiliated companies. It is our view that the expertise and resources of all affiliated companies may properly be called upon to perform cost studies for conversion of average study companies to interstate cost status. Furthermore, all reasonable costs of such studies will be recovered through interstate rates. *Average Schedule Order* at para. 6, n.17. The Court of Appeals expressed no reservation concerning this conclusion, but questioned only our initial, related conclusion that the existence of any cost-based affiliate indicated sufficient resources for the preparation of cost studies. NARUC v. FCC, 737 F.2d at 1128. The Court did not indicate that it was aware of the fact that the expenses of preparing interstate cost studies are fully compensable from the carrier common line pool. *See id. See generally* 47 C.F.R. §§ 69.401, 69.605(b)-(c), 69.606(a) (1984). From a jurisdictional perspective,

there are three types of cost studies: (1) wholly interstate; (2) wholly intrastate; (3) joint (*i.e.*, interstate and intrastate). The reasonable expenses of wholly interstate cost studies are compensable, in toto, from interstate ratepayers. The expenses of cost studies that are used jointly for interstate and intrastate settlements are allocable, respectively, to interstate and intrastate revenue requirements.

[26] *See* 47 C.F.R. §69.602 (1984).

[27] To the extent that TDS seeks reconsideration on the ground that section 69.605(c)(1) requires it to restructure the corporate status of any of its affiliates, its concerns are misplaced. Nothing in section 69.605(c)(1) requires such a result, and there is no evidence in the TDS petition that such a conclusion should be drawn from the clear wording of that rule.

[28] TDS did not disclose whether any, or all, of its interstate average schedule companies already perform, or have performed, cost studies for intrastate settlements. Nor did TDS disclose the extent to which its interstate average schedule affiliates are presently receiving cost study compensation for "line haul" functions pursuant to the waiver that is presently in effect.

[29] These estimates should take into account any less burdensome conversion procedures made available by NECA. *See infra* note 89.

[30] It may be necessary to investigate questions of fact that relate to the specific waiver requests. Under the Commission's rules, the Chief, Common Carrier Bureau possesses the authority to investigate matters that relate to such requests. 47 C.F.R. §0.91 (1984).

[31] Less burdensome procedures for conversion of average schedule companies to cost company status should also help ease the difficulties envisioned by TDS. *See infra* note 88.

[32] The effective date of that order was subsequently waived, until further order on December 27, 1985. MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Order Waiving Application of Rule, Mimeo No. 1704 (December 27, 1985).

[33] We would note that our observations here with respect to TDS' request would also be applicable if a subset three company became a subset two company as a consequence of the acquisition of an average schedule company.

[34] The less burdensome procedures being developed by NECA for converting average schedule companies to cost status should make any such showing more difficult in the future. *See infra* note 88.

[35] For example, the date requested by an average schedule company for cost company treatment by NECA can be tied to, and made contingent upon, its acquisition by a subset 1 or subset 2 company.

[36] For reasons already discussed, we decline to adopt TDS's third requested modification in the alternative. *See supra* paras. 7, 10.

[37] ICORE is a consulting firm that has undertaken, for the purpose of this petition, to represent the following independent telephone companies: Breda Telephone Cooperative, Breda, Iowa; Bretton Woods Telephone Co., Bretton Woods, New Hampshire; City of Brookings Municipal Telephone Co., Brookings, South Dakota; Decatur Telephone Company, Decatur, Arkansas; Dunnell Telephone Co., Dunnell, Minnesota; Kadoka Telephone Co., Kadoka, South Dakota; Mount Rushmore Telephone Co., Keystone, South Dakota; National Utilities, Inc., Port Townsend, Washington; North State Telephone Co., High Point, North Carolina; Northwest Iowa Telephone Co., Sergeant Bluff, Iowa; Prairie Grove Telephone Co., Prairie Grove, Arkansas; Ringgold Telephone Co., Ringgold, Georgia; Summit Telephone and Telegraph Co. of Alaska, Fairbanks, Alaska; Trenton Telephone Co., Trenton, Georgia; Union Telephone Co., Farington, New Hampshire; Winn Telephone Co., Winn, Michigan; the Woodbury Telephone Co., Woodbury, Connecticut; Sandhill Telephone Cooperative, Inc., Jefferson, South Carolina; Pioneer Telephone Association, Inc., Ulysses, Kansas.

[38] On May 27, 1986, ICORE also filed an "Emergency Petition for Stay Pending Judicial Review" for the following independent telephone companies: City of Brookings Municipal Telephone Co., Brookings, South Dakota; Decatur Telephone Co., Decatur, Arkansas; Dunnell Telephone Co., Dunnell, Minnesota; Kadoka Telephone Co., Kadoka, South Dakota; Jefferson Telephone Co., Jefferson, South Dakota; Mount Rushmore Telephone Co., Keystone, South Dakota; National Utilities, Inc., Port Townsend, Washington; North State Telephone Co., High Point, North Carolina; Prairie Grove Telephone Co., Prairie Grove, Arkansas; Summit Telephone and Telegraph Co. of Alaska, Fairbanks, Alaska; Union Telephone Co., Farmington, New Hampshire; and Pioneer Telephone Association, Inc., Ulysses, Kansas. That petition is denied on the ground that ICORE failed to make any of the showings that are required under Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n, 259 F.2d 921, 925 (D.C. Cir. 1958); or under Wisconsin Gas Co. V. FERC, No. 84-1358, slip op. 18-22 (D.C. Cir. March 29, 1985).

[39] ICORE petition at 1-2.

[40] *Id.* at 3-4.

[41] *Id.* at 6, n.11 ("Under Section 69.606(b) of the Commission's rules, 47 C.F.R. §69.606(b), NECA is required to give advance notice of proposed changes to the average schedules or to certify that no changes are warranted. NECA's failure to propose changes accommodating the special access treatment of WATS lines thus certified that no changes in the current settlements methodology for these facilities were warranted").

[42] NECA Comments at 1-2.

[43] *See* NECA Comments at 1-4.

[44] *See* NTCA and OPASTCO Comments at 3-7.

[45] *Id.* at 2-3.

[46] *See id.* at 2-4, 6-9.

[47] *Id.* at 6-7.

[48] *See* Report and Order in CC Docket 86-1, FCC 86-115 (released March 21, 1986) and references cited therein. *See generally* Comments of NCTA and OPASTCO at 4-7. ICORE did not contend in the direct assignment of WATS closed-end lines docket that the treatment of closed ends as special access lines was inappropriate. To the extent that ICORE seeks reconsideration of that order, its attack is untimely and misplaced. *See* section 405 of the Communications Act of 1934, as amended, 47 U.S.C. §405 (1984).

[49] *See generally* P&R Temmer v. FCC, 743 F.2d 918, 929 (D.C. Cir. 1984); Wait Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

[50] The Northwest Iowa Telephone Company is owned by a holding company, Long Lines, Ltd.

[51] Petition for Temporary Waiver of the Average Schedule Revisions filed by the Northwest Iowa Telephone Company (June 17, 1986) ("Northwest Iowa Petition") at 1.

[52] Northwest Iowa does not state that its regulated local exchange telephone operations will become unprofitable, but rather that Northwest Iowa's other activities will be unprofitable. These other activities apparently include telemarketing and resale operations. *See generally,* Northwest Iowa Petition at 6-8; Opposition of the National Telephone Cooperative Association, *passim;* Opposition of the National Exchange Carrier Association at 3; Northwest Iowa's Reply to Oppositions to Petition for Temporary Waiver of the Average Schedule Revisions, *passim.*

[53] Northwest Iowa Petition at 2-10.

[54] Northwest Iowa Petition at 4-5.

[55] *Id.* at 7.

[56] Opposition of the NTCA at 4-5 (citation omitted).

[57] NECA Opposition at 2.

[58] NTCA Opposition at 4.

[59] Northwest Iowa Petition at Appendix A, page 3.

[60] MTS and WATS Market Structure, 48 Fed. Reg. 10319, 10366 (March 11, 1983).

[61] Financial relief for Northwest Iowa's collateral activities is purpose neither explicitly, nor implicitly, contemplated by the Communications Act. *See* 47 U.S.C. §§1 et seq. (1984). *See also* C.C.I.A. et al v. FCC, 693 F.2d 198 at 205 n.25 (D.C.Cir. 1984).

[62] *See supra* para. 20, n.48.

[63] We find nothing in the NECA plan as originally filed, in the average schedules that became effective on June 1, 1986, or in the record in this proceeding to suggest that the new average schedule methodology would, or could, produce such a result.

[64] *Average Schedule Order* at paras. 7-12. *See generally* NECA Proposed Revisions to the Average Schedules (filed September 17, 1985), *passim*.

[65] Jefferson Telephone Company Waiver Petition, *passim*. In addition to its request for a waiver of the "flash cut" provision, Jefferson requests that we give its petition expedited consideration and that if we grant the waiver request, we order NECA to ""true-up' Jefferson's settlements for every month they are flash cut while the Petition is pending." *Id.* at 2.

[66] *Id.* at 1.

[67] *Id.* at 2.

[68] *Id.* at 2. Jefferson notes that many of its subscribers place interstate calls to Sioux City, Iowa for shopping and health care purposes. *See id.* at 3.

[69] *Id.* at 3.

[70] *Id.* at 3; Affidavit of Richard Conners at para. 6; Attachment A at 4, 6.

[71] *Id.* at 4, 8, Reimers Affidavit at para. 21.

[72] Jefferson petition at 5. Jefferson supplied, as attachments to its petition: an affidavit from a co-owner (Mr. Richard Conners); an opinion letter from Olsen, Thielen & Co., Ltd, Certified Public Accountants with attached Jefferson Telephone Company financial statements; correspondence from NECA; and an affidavit from Mr. Jan Reimers with supporting calculations.

[73] Jefferson petition at 4. The 15.9 message per line limit corresponded to an 85 percent interstate NTS costs allocation based upon studies performed by NECA that Jefferson contends were flawed. *See id.* at 4-5. *See generally Average Schedule Order* at paras. 7-12.

[74] Jefferson Petition at 5 (footnotes omitted, emphasis in the original).

[75] *Id.* at 5-6.

[76] Jefferson Petition at 7.

[77] Jefferson Petition at 11.

[78] *See supra* note 85.

[79] Jefferson Petition at 5. Jefferson does not contend that its interstate message count per access line is less than the 15.9 message level that requires flash-cut treatment under the average schedules.

[80] "SPF" is an acronym for "Subscriber Plant Factor." *See generally* section 67.124(d)(4)(i) of the Commission's rules, 47 C.F.R. § 67.124(d)(4)(i).

[81] Evidently Mr. Reimers thought those statements were audited. *See* Attachment A to Affidavit of Jan Reimers at 1.

[82] Jefferson Petition, Attachment A at 1 to Affidavit of Richard Conners (emphasis supplied).

[83] *Id.* (emphasis supplied).

[84] *See* Attachment B to Affidavit of Jan Reimers.

[85] Our ultimate determination with respect to the application of the flash-cut to Jefferson after May 31, 1986, will depend upon the results of our investigation. *See supra* note 3 and para. 32.

[86] Our concern here is directed to companies that, because of their very small size, have lacked necessary management and/or information resources to keep abreast of, or respond to, these changes. While any size limitation is to some extent arbitrary, in our view the 5,000 common line criterion focuses this additional transitional relief to those carriers with the greatest need. We are thus targeting this relief to: (1) unaffiliated average schedule companies with fewer than 5,000 common lines; and (2) affiliated average schedule companies that, with all other exchange carrier affiliates, have fewer than 5,000 common lines.

[87] This waiver means that small average schedule companies that would receive reduced aggregate settlements under the revised average schedules, may elect to continue to be compensated under the pre-existing average schedule formulas through July 31, 1986. Election of such treatment must be made by December 1, 1986. *See supra* note 3.

[88] *See* NECA Opposition at 3 ("NECA is currently revising its procedures to facilitate conversion from average schedules to cost. The new procedures will allow companies to submit initial estimates based on an acceptable analysis of financial data. Settlements can then proceed on the basis of these estimates. A fully documented cost study must be completed within seven months following the end of the calendar year in which those estimate s are first used for settlement purposes. Accordingly, all average schedule companies will soon have the option under these procedures to convert to cost in an expedited and less costly manner.").

[89] *See* section 1 of the Communications Act of 1934, as amended, 47 U.S.C. §151 (1984).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-56

In the Matter of

Designation of a Standard Computer Algorithm for Propagation Prediction in the FM and TV Broadcast Services.

NOTICE OF PROPOSED RULE MAKING

Adopted: January 29, 1988; Released: February 23, 1988

By the Commission:

INTRODUCTION

1. The Commission, on its own motion, initiates this proceeding by proposing to designate the algorithm employed in its computer programs as the standard it will use for propagation calculations in the FM and TV broadcast services. As this algorithm was used to draw the metric curves in the Commission's rules, no changes to the predicted signal strength values represented by the curves will result. Establishing the Commission's algorithm as the official standard for FM and TV propagation calculations will facilitate the resolution of discrepancies that occur when visual readings or other algorithms are used to determine field strength values. Thus, it will further our objective of providing efficient, expeditious service to the public.

BACKGROUND

2. A fundamental concern of the Commission and other organizations engaged in spectrum management is the development and utilization of appropriate models of real-world electromagnetic propagation. Through its ongoing propagation analysis program, the Commission collects and studies propagation data, and has been doing so for many years. Generally, radio wave propagation measurement data are gathered, analyzed statistically, and presented in the form of curves drawn on graph paper. This form of presentation has the advantages of compactness, versatility, and ability to readily display relationships among several factors that affect radio wave propagation.

3. The six propagation charts currently contained in our broadcasting rules[1] were developed by a group of engineers from government and industry.[2] They are based on measurement data collected by the Commission and industry over a period of two decades. [3] Each of the charts comprises a set of propagation curves drawn on a linear-logarithmic graph. Three of the charts contain 40 curves each, and the other three contain 50 curves each.

4. Prior to the widespread use of computers, propagation curves were the most practical tool to use for prediction of radio wave propagation for allotment and assignment purposes. Visually reading values from the curves, however, has always been a laborious task. Today, not unlike the engineer's slide rule, such curves suffer from a relative lack of precision[4] and speed when compared to computer programs. Consequently, many broadcast engineering consultants use computer programs that employ propagation data tables and interpolation algorithms to perform the curve reading function. The Commission's staff also developed and uses such a program.[5]

5. Unfortunately, the various computer programs in use by the consultants do not always agree with each other or with the Commission's program. This happens because they are based on different algorithms, and thus vary with respect to the particular data values, the number of data points used, and the particular interpolation method employed. Because the curves in the rules currently constitute the standard, we have accepted some deviation in submissions based on values taken from the curves.

6. However, we believe that the time has come for a more precise standard. In recent actions, we have created additional classes of FM stations[6], refined the method we use to classify existing and proposed FM stations and simplified the rule that permits grandfathered short-spaced FM stations to modify their facilities.[7] We have also opened an inquiry into the possible use of directional antennas to permit short-spacing in the FM service.[8] All of these actions place additional importance on calculations involving readings from the propagation curves. The full-power TV service and the Low Power TV service would also benefit from a systematic uniform method for obtaining consistent predictions of coverage and interference.

PROPOSAL

7. In the *Notice of Inquiry* looking into the use of directional antennas to permit short-spaced FM assignments, we asked for public comment on the relative advantage of designating the Commission's algorithm as the only computation standard upon which all proposals (for short-spaced FM stations using directional antennas) would be evaluated.[9] A review of the comments received in that proceeding reveals that almost all of those addressing this question favor mathematical methods over the current graphical procedures. These commenters agree with us that the consistent and repeatable determinations of a computer program are preferable to the expenditure of time and other resources to resolve disputes over various readings of the curves. Therefore, we are proposing to designate the Commission's algorithm[10] as the computational standard upon which all proposals in the FM and TV broadcast services will be evaluated.

8. Our proposal would allow applicants and their consultants to continue to use methods other than the proposed standard algorithm for propagation calculations. Enlarged versions of the charts contained in Sections 73.333 (Figures 1 and 1a) and 73.699 (Figures 9, 9a, 10, 10a, 10b, and 10c) will continue to be available for the convenience of those who prefer to use graphical means to perform field strength predictions. We are also considering whether to produce tables of values generated by the proposed standard algorithm, which could be made available in a Technical Memorandum for purchase through our copy contractor or through NTIS to those who wish to use tabular methods.[11] However, in any case where a discrepancy arises, we propose to consider the determinations of our computer programs using the designated algorithm to be deciding. We are proposing to add a

paragraph to each of the rule sections governing prediction of coverage to state this policy. *See* proposed Sections 73.313, 73.333, 73.509, 73.684, 73.699, 74.705, 74.707, and 74.709 in the Appendix.

9. We recognize that some individual station licensees may evaluate this proposal primarily on the basis of how, if at all, their particular station would be affected. Therefore, at the outset, we emphasize that our intent is not to reclassify or modify any existing station. We are seeking only to codify the more consistent method for propagation prediction calculations that we have been using for more than a decade. Because of the limitations in printing resolution and human visual acuity, it is not unusual for different persons to obtain slightly different results when reading values from the propagation charts. Consequently, there may be some FM stations licensed with a combination of HAAT and ERP that we found acceptable when the values were obtained from the charts, but which we would reject under this proposal because they would exceed (by a small amount) the values obtained using the computer algorithm. Likewise, in the TV broadcast service, some minor variations in the precise locations of Grade A and B contours determined by the computer algorithm as compared to the charts can be expected. We ask for comment on any unintended effects that usage of the more precise computer algorithm may have and suggestions on how to minimize any such effects. We propose to use "grandfather" provisions to prevent hardships to any stations that would otherwise be adversely affected and request comment addressing whether such provisions are needed, and if so, what form they should take.

10. In the comments to another proceeding, it was suggested that a different computer algorithm be established as the standard for propagation calculations.[12] We realize that many consultants are currently using computer programs that they have developed over the years, that these programs usually produce sufficiently precise results, and that they undoubtedly produce more consistent results than one would obtain by simply reading the propagation charts. However, we have more than ten years of experience with our algorithm, and have found it to be more than adequate for our purposes. It is consistent with the curves (in fact, it was used to draw the metric curves), and we already have a considerable amount of developed, debugged, and running software based on it that is an integral part of our licensing processes. In addition, we have provided copies of the software to a number of consulting engineers who have asked to see the algorithm. Therefore, we find that using this algorithm is preferable to using any other.

COMMENT PROCEDURE

11. Under procedures set out in Section 1.415 of the rules and regulations, 47 CFR § 1.415, interested persons may file comments on or before **April 18, 1988** and reply comments on or before **May 3, 1988.** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in Report and Order.

12. In accordance with the provisions of Section 1.419 of the Rules and Regulations, 47 CFR § 1.419, formal participants shall file an original and 5 copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the general public who wish to express their comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

EX PARTE CONSIDERATIONS

13. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a). The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda, and terminates when the Commission (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. Section 1.1202(f). During the Sunshine Agenda period, no presentations, *ex parte* or otherwise, are permitted unless specifically requested by Commission or staff for the clarification or adduction of evidence or the resolution of issues in the proceeding. Section 1.1203.

14. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. Section 1.1202(b). Any person who submits a written *ex parte* presentation must provide on the same day it is submitted a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously-filed written comments, memoranda, or filings in the proceeding must provide on the day of the oral presentation a memorandum to the Secretary (with a copy to the commissioner or staff member involved) which summarizes the data and arguments. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates. Section 1.1206.

INITIAL REGULATORY FLEXIBILITY ANALYSIS

15. In accordance with Section 605(b) of the Regulatory Flexibility Act of 1980 (Pub. L. 96-354), an Initial Regulatory Flexibility Analysis has been prepared:

I. Reason for Action

Advancement in computer technology has changed many of the procedures used in the practice of broadcast engineering. One such procedure, the visual reading of curves plotted on graph paper, was widely used in the past to perform radio wave propagation calculations and predict probable signal strengths for FM and TV broadcast facilities. Today this procedure has largely given way to the use of computers to perform the same function more rapidly and precisely. Recent actions affecting the FM and TV broadcast services have increased the importance of precision and repeatibility in propagation calculations. Recognizing this, the Commission is proposing to designate a standard computer algorithm that will be used to resolve discrepancies that may occasionally arise from the use of the older graphical method or other computer methods.

II. Objective

The action proposed is intended to facilitate allotment and assignment procedures in the FM and TV broadcast services, and thus further the Commission's objective of providing efficient, expeditious service to the public.

III. Legal Basis

The legal basis for the proposed action is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

IV. Description, Potential Impact, and Number of Small Entities Affected

There are approximately 200 small entities (consulting businesses) and a few larger entities that provide engineering services to broadcasters on a contract basis. Some of the small entities already use the Commission's algorithm -- however, many do not. Although the proposed rules would designate the Commission's algorithm as the official computational standard, these rules would not mandate use of the designated algorithm by the aforementioned small entities. Nevertheless, if the Commission ultimately adopts its proposal to designate its algorithm as the official computational standard, some of these small entities may feel compelled for competitive or other reasons to obtain the capability to perform propagation calculations using the designated algorithm. This could involve the purchase of additional computer hardware and software, depending on the small entity's current computer facilities.

V. Recording, Record Keeping, and Other Compliance Requirements

The subject proposal does not entail any recording, record keeping, or other compliance requirements.

VI. Federal rules that Overlap, Duplicate, or Conflict with the Proposed Rules

The proposed rules would replace existing rules that specify procedures for visual reading of propagation curves as the computational standard. Consequently, no federal rules would overlap, duplicate, or conflict with the proposed rules.

VII. Any Significant Alternatives Minimizing Impact on Small Entities and Consistent with Stated Objective

A few of the small entities have developed and are using various algorithms other than the Commission's algorithm for propagation calculations in the FM and TV services. Any one of these might be suitable to accomplish the stated objective and could be designated as the computational standard instead of the Commission's algorithm. However, no matter which algorithm is designated, many of the small entities will not be using that algorithm and some may feel compelled to change to it although the proposed rule would not mandate such a changeover. Furthermore, because the Commission has been using the same algorithm for more than ten years and has made the algorithm available to the small entities and others during this time, it is quite possible that more small entities are already using the Commission's algorithm than any other single algorithm. If this is the case, the Commission's proposal is the course of action having the minimum impact on the small entities.

OTHER MATTERS

16. The proposal contained herein has been analyzed with respect to the Paperwork Reduction Act of 1980 and found to contain no new or modified form, information collection and/or record keeping, labeling, disclosure, or record retention requirements; and will not increase or decrease burden hours imposed on the public.

17. IT IS PROPOSED, pursuant to authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 154 and 303, That Parts 73 and 74 of the Commission's Rules be AMENDED as set forth in the Appendix below.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

APPENDIX

It is proposed to amend 47 CFR Part 73 as follows:

1. The authority citation for Part 73 would continue to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 73.313 would be amended by adding an introductory text to read as follows:

§ 73. *313 Prediction of coverage.*

For evaluation of FM propagation calculations based on the field strength curves contained in § 73.333, Figures 1 and 1a, values produced by the Commission's computer algorithm (*see* § 73.4240) shall be considered definitive.

* * * * *

3. 47 CFR 73.333 would be amended by revising the introductory text, as follows:

§ 73. *333 Engineering charts.*

This section consists of the following Figures 1 (with sliding scale), 1a, 2, 4 and 5. For evaluation of FM propagation calculations based on the field strength curves contained in Figures 1 and 1a, values produced by the Commission's computer algorithm (*see* § 73.4240) shall be considered definitive.

* * * * *

4. 47 CFR 73.509 would be amended by adding a new paragraph (c)(4), to read as follows:

§ 73. 509 *Prohibited overlap.*

* * * * *

(c) * * *

(4) For evaluation of FM propagation calculations based on the field strength curves contained in § 73.333, Figures 1 and 1a, values produced by the Commission's computer algorithm (*see* § 73.4240) shall be considered definitive.

* * * * *

5. 47 CFR 73.684 would be amended by adding an introductory text, to read as follows:

§ 73. 684 Prediction of coverage.

For evaluation of TV propagation calculations based on the field strength curves contained in § 73.699, Figures 9, 9a, 10, 10a, 10b and 10c, values produced by the Commission's computer algorithm (*see* § 73.4240) shall be considered definitive.

* * * * *

6. 47 CFR 73.699 would be amended by revising the introductory text, as follows:

§ 73. 699 TV engineering charts.

This section consists of the following Figures 1-5, 5a, 6-10, 10a-e, 11-12 and 13-16. For evaluation of TV propagation calculations based on the field strength curves contained in § 73.699, Figures 9, 9a, 10, 10a, 10b and 10c, values produced by the Commission's computer algorithm (*see* § 73.4240) shall be considered definitive.

* * * * *

7. A new section, 47 CFR 73.4240, would be added:

§ 73. 4240 Field strength computer algorithm.

See paper entitled "Algorithm for Computing Field Strength for FM and TV Broadcast Stations", available from the Commission's copy contractor.

It is proposed to amend 47 CFR Part 74 as follows:

1. The authority citation for Part 74 would continue to read as follows:

Authority: 47 U.S.C. 154 and 303.

2. 47 CFR 74.705 would be amended by adding an introductory text to read as follows:

§ 74. 705 TV broadcast station protection.

For evaluation of TV, low power TV and TV translator propagation calculations based on the field strength curves contained in § 73.699, Figures 9, 9a, 10, 10a, 10b and 10c, values produced by the Commission's computer algorithm (*see* § 73.4240) shall be considered definitive.

* * * * *

3. 47 CFR 74.707 would be amended by adding an introductory text to read as follows:

§ 74. 707 Low power TV and TV translator station protection.

For evaluation of low power TV and TV translator propagation calculations based on the field strength curves contained in § 73.699, Figures 9, 9a, 10, 10a, 10b and 10c, values produced by the Commission's computer algorithm (*see* § 73.4240) shall be considered definitive.

* * * * *

4. 47 CFR 74.709 would be amended by adding an introductory text to read as follows:

§ 74. 709 Land mobile station protection.

For evaluation of low power TV and TV translator propagation calculations based on the field strength curves contained in § 73.699, Figures 9, 9a, 10, 10a, 10b and 10c, values produced by the Commission's computer algorithm (*see* § 73.4240) shall be considered definitive.

* * * * *

FOOTNOTES

[1] These propagation charts establish a correspondence between the effective radiated power (ERP) and antenna height above average terrain (HAAT) of an FM or TV station and the predicted median strength of the signal as a function of distance from the transmitting antenna. The charts are used to determine, among other things, the distance to various field strength contours. Such contour distances are used in FM station application processing to classify stations, determine allowable HAAT/ERP combinations, perform interference calculations for NCE-FM stations, and for other purposes. In the television service, the Grade A and B service contours are determined using the propagation charts.

[2] The curves were published first in "Report of the Working Group for the Engineering Conference in Docket No. 16004, on the Development of New FM and TV Propagation Curves," dated April 12, 1966.

[3] The data and a brief history of the development of the curves may be found in FCC Report R-6502, "Development of New VHF and UHF Propagation Curves for Television Broadcasting," April 26, 1965, and its successor FCC Report R-6602, "Development of VHF and UHF Propagation Curves for TV and FM Broadcasting," September 7, 1966.

[4] We recently adopted a classification system for FM broadcast stations that relies primarily on power and antenna height limitations and secondarily on the rounded distance to the station's 1 mV/m contour or "reference distance." We stated at that time our reluctance to adopt a classification system based solely on field strength contour distances because of the reasonable variations that may occur when different persons read values from the propagation charts in the rules. *See Second Report and Order*, in FCC 87-296, MM Docket 86-144, released September 25, 1987, 2 FCC Rcd 5693 (1987).

[5] The Commission's program, written in FORTRAN, utilizes six data tables and a bivariate interpolation routine. Interested persons should consult the following references for further information on it: (1) FCC/OCE REPORT NO. RS 76-01 "Field Strength Calculation for TV and FM Broadcasting (Computer Program TVFMFS)", by Gary S. Kalagian, January 1976, (2) "A Method of Bivariate Interpolation and Smooth Surface Fitting based on Local Procedures", by Hiroshi Akima, U.S. Department of Commerce, Office of Telecommunications, March 1973, and (3) "Algorithm 474, Bivariate Interpolation and Smooth Surface Fitting Based on Local Procedures"; *Communications of the ACM*, January 1974, Volume 17, Number 1, page 26.

[6] *See Report and Order* in FCC 83-259, BC Docket 80-90, released June 14, 1983, 94 FCC 2d 152 (1983).

[7] *See Second Report and Order*, FCC 87-296, MM Docket 86-144, released September 25, 1987, 2 FCC Rcd 5693 (1987).

[8] *See Notice of Inquiry*, FCC 87-152, MM Docket No. 87-121, released May 26, 1987, 2 FCC Rcd 3141 (1987).

[9] *Id.*, at paragraph 11.

[10] Copies of a comprehensive description of the Commission's algorithm may be obtained from the Commission's copy contractor. This description includes the relevant data tables, boundary conditions, methodology and mathematical formulas. In addition, a U.S. Department of Commerce report describing the bivariate interpolation method (see footnote 5, reference 2) is reproduced in its entirety.

[11] For example, the Commission could create a table of distances to specific contours, as a function of antenna height above average terrain and effective radiated power. If such a table contained a sufficiently large number of distances, relatively simple interpolation methods, such as linear interpolation, could be used to find intermediate values.

[12] The firm of Hammett & Edison, Inc., Consulting Engineers, (H&E) submitted an extensive description of its curve reading and interpolation algorithm to the record established by the *Notice of Proposed Rule Making* in MM Docket 86-144. H&E's algorithm utilizes six data tables and a combination linear/logarithmic interpolation method. It was written in reverse Polish notation for execution on a Hewlett-Packard HP-41CX hand-held calculator. H&E claimed that its method is precise and accurate, and urged that it be adopted instead of the index method of FM station classification then under consideration. H&E also provided source code for BASIC and FORTRAN computer language programs employing the same algorithm.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-69

In re Applications of

CBS, INC. File No. BRCT-870803KX

For Renewal of License of
Station WBBM-TV
Chicago, Illinois

CENTER CITY COMMUNICATIONS LIMITED PARTNERSHIP File No. BPCT-871028KF

For Construction Permit
Chicago, Illinois

HEARING DESIGNATION ORDER

Adopted: January 29, 1988; Released: February 23, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned application for renewal of the license of Station WBBM-TV, Channel 2, Chicago, Illinois, filed by CBS, Inc. (CBS); the mutually exclusive application of Center City Communications Limited Partnership (Center City) for a construction permit for a new television station to operate on Channel 2 in Chicago; a petition to deny the Center City application filed by CBS; and related pleadings.

2. CBS has filed a petition to deny Center City's application, alleging that Center City has failed to comply with Section 73.3580 of the Commission's Rules. That rule requires an applicant for a new television station to give local notice of the filing of its application in a daily newspaper of general circulation published in the community in which the station is proposed to be located, at least twice a week for two consecutive weeks within a three-week period. The notice is required to state, among other things, the name of the applicant, the purpose for which the application was filed, the date the application was tendered for filing, the proposed channel of operation, and the nature of the facilities sought. CBS states that Center City has patently failed to comply with the publication requirement in that only three notices were published. Of those notices, the first did not identify the applicant or the filing date or nature of the facilities being sought. The third notice, CBS states, was published outside the three-week period specified in the rule. In opposition to the petition to deny, Center City states that it did, in fact, make arrangements for the appropriate notices to be published in the *Chicago Daily Defender*. However, due to the newspaper's error, the notices were not published in accordance with the instructions given by Center City. The Classified Manager of the *Chicago Daily Defender* supports Center City's statement in an affidavit. In view of these circumstances, Center City states that the *Defender* is publishing three additional complete notices. Furthermore, out of an abundance of caution, Center Center is also publishing the full notice in *The Chicago Tribune*, another daily newspaper of general circulation in Chicago.[1] Under the circumstance, we find that no material question of fact exists as to whether Center City has complied, or will comply, with Section 73.3580 of the Commission's Rules. Accordingly, CBS's petition to deny will be denied.

3. Except as indicated by the issues specified below, the applicants are qualified to operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

4. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, better serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the foregoing issue, which of the applications should be granted.

5. IT IS FURTHER ORDERED, That CBS, Inc.'s petition to deny IS DENIED.

6. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

7. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

FOOTNOTE

[1] CBS also suggests that the *Daily Defender*, because of its low circulation, is not an appropriate vehicle for publication. We reject this contention. *The Daily Defender* is a daily newspaper of general circulation, and our rules require no more.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-61

In re Applications of

COYLE COMMUNICATIONS, LTD.	File No. BPCT-870330KX
RURAL NEW YORK BROADCASTING	File No. BPCT-870610KM

For Construction Permit
Corning, New York

HEARING DESIGNATION ORDER

Adopted: January 29, 1988; Released: February 23, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications for a new commercial television station to operate on Channel 48, Corning, New York.[1]

2. The effective radiated visual power, antenna height above average terrain and other technical data submitted by the applicants indicate that there would be a significant difference in the size of the area and population which would be served by each. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

3. No determination has been reached that the tower height and location proposed by each of the applicants would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

4. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since these applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to each of the applicants, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

6. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT in this proceeding with respect to issue 1.

7. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

FOOTNOTE

[1] The Association of Maximum Service Telecasters, Inc. (AMST) filed an objection to the application of Coyle Communications, Ltd., on the grounds that its proposed transmitter site was shortspaced. On August 5, 1987, Coyle filed an amendment in response to AMST's objection changing its transmitter site to a location which meets the Commission's minimum separation requirements. AMST thereupon withdrew its objections.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-62

In re Applications of

CHURCH OF CHRIST MINISTRY, INC. File No. BPCT-8703311L

SKYCOM, INC. File No. BPCT-870610KN

For Construction Permit
Fond du Lac, Wisconsin

HEARING DESIGNATION ORDER

Adopted: January 29, 1988; Released: February 23, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications of Church of Christ Ministry, Inc. (CCM), and Skycom, Inc. (Skycom) for authority to construct a new commercial television station on Channel 68, Fond du Lac, Wisconsin.

2. Our review of the technical proposals indicates that the coverage areas proposed by the applicants differ significantly. Consequently, the areas and populations which would be within the predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

3. No determination has been reached that the tower height and location proposed by each of the applicants would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

4. Section IV, FCC Form 301, requires an applicant for a television station to submit, as an exhibit, a brief description, in narrative form, of its planned programming service relating to the issues of public concern facing the proposed service area. CCM has not submitted such an exhibit. Accordingly, the applicant must file the appropriate exhibit with the presiding Administrative Law Judge within 30 days after this Order is released.

5. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

6. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower height and location proposed by each of the applicants would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

8. IT IS FURTHER ORDERED, That Church of Christ Ministry, Inc. shall submit its response to Section IV, FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

9. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-63

In re Applications of

RED MOUNTAIN BROADCASTING COMPANY — File No. BPCT-870619KH

KUTV, INC. — File No. BPCT-870812KG

For Construction Permit
St. George, Utah

HEARING DESIGNATION ORDER

Adopted: January 29, 1988; Released: February 23, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications for authority to construct a new commercial television station on Channel 12, St. George, Utah.

2. The principals of Red Mountain Broadcasting Company are principals of Washoe Broadcasting Company and of Valley Broadcasting Company, licensee of Station KVBC(TV), Las Vegas, Nevada. Washoe was an applicant for a construction permit for a new station in a comparative hearing along with Circle L., Inc., applicant for renewal of the license of Station KCRL-TV, Reno, Nevada (MM Docket No. 85-50). Issues were specified against Washoe as to its basic qualifications to be a Commission licensee, including issues as to misrepresentations made to the Commission or lack of candor. These issues were never tried in Docket No. 85-50 because the Washoe application was dismissed. In July 1985, the application of William H. Hernstadt, et al. for a construction permit for a new television station on Channel 3, Las Vegas, Nevada, was designated for comparative hearing along with the application of Valley Broadcasting Company for renewal of the license of Station KVBC(TV). Because the misrepresentation issues specified against Washoe were not tried, they were transferred for trial in the Las Vegas comparative hearing in Docket No. 85-228. Subsequently, other basic qualifying issues were added against Valley. The presiding Administrative Law Judge in Docket No. 85-228 has not yet issued a decision in the proceeding. Therefore, any grant of the Red Mountain application in the instant proceeding will be made subject to such action as the Commission may deem appropriate as a result of the outcome of the proceedings in MM Docket No. 85-228.

3. Section 73.3555(a)(3) of the Commission's Rules states that no license for a television broadcast station shall be granted to any party if such party directly or indirectly owns, operates, or controls one or more broadcast stations in the same service and the grant of such license will result in any overlap of the Grade B contours of the existing and proposed stations. The principals of Red Mountain Broadcasting Company are also principals of Valley Broadcasting Company (see paragraph 2, supra), licensee of Station KVBC(TV), Las Vegas, Nevada. Our review of the engineering portion of the application discloses that there would be Grade B overlap of Station KVBC-TV and the proposed station. The applicant has requested a waiver of the rule.[1] Accordingly, an appropriate issue will be specified.

4. The effective radiated visual power, antenna height above average terrain and other technical data submitted by each applicant indicate that there would be a significant difference in the size of the area and population which would be served by each. Consequently, the areas and populations which would be within the predicted 56 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

5. No determination has been reached that the tower height and location proposed by each of the applicants would not constitute a hazard to air navigation. Accordingly, an issue regarding this matter will be specified.

6. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, with respect to each of the applicants, whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.

2. To determine whether the application of Red Mountain Broadcasting Company is consistent with Section 73.3555 of the Commission's Rules and, if not, whether circumstances exist which would warrant a waiver of the Rule.

3. To determine which of the proposals would, on a comparative basis, better serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

8. IT IS FURTHER ORDERED, That a grant of the application of Red Mountain Broadcasting shall be subject to the following condition:

Subject to the condition that grant of this application is without prejudice to such action as the Commission may deem appropriate as a result of the outcome of the proceedings in MM Docket No. 85-228.

9. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

10. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

11. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

FOOTNOTE

[1] The applicant submits an engineering showing which purports to demonstrate that no actual overlap will occur due to terrain limitations. However, the showing is deficient in two significant respects. First, the applicant fails to document the procedures used in reaching its engineering conclusions. No calculations, formulas, values etc. are provided. Additionally, the applicant appears to have intermixed two separate prediction methods in computing its contours. In any case, we can not evaluate the waiver request from the information submitted.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-59

In re Applications of

ROBIN C. BRANDT — File No. BPCT-870331QD

Audrey G. Osmundson d/b/a NEWTON BROADCASTING COMPANY — File No. BPCT-870610KL

For Construction Permit
Newton, Iowa

HEARING DESIGNATION ORDER)

Adopted: January 29, 1988; Released: February 23, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications to construct a new commercial television station on Channel 39, Newton, Iowa.

2. Dean Osmundson is the husband of applicant Audrey Osmundson, and he is a Director and 51% owner of MTN Broadcasting, Inc., licensee of Station KDAO(AM), Marshalltown, Iowa. Audrey Osmundson is Secretary, Treasurer and 24% owner of MTN Broadcasting. There is a rebuttable presumption that the interests of each spouse are attributable to the other. Marshalltown would be within the predicted Grade A contour of the proposed television station. Section 73.3555(b)(1) of the Commission's Rules proscribes common ownership, operation or control of an AM station and a television station where the city of license of the AM station would be within the Grade A contour of the television station. Audrey Osmundson, however, has represented to the Commission that in the event of a grant of the television application, she and her husband will divest themselves of all interest in and connection with the licensee of Station KDAO(AM). Accordingly, a grant of the television application will be subject to a divestiture condition.

3. Section IV, FCC Form 301, requires an applicant for a television station to submit, as an exhibit, a brief description, in narrative form, of its planned programming service relating to the issues of public concern facing the proposed service area. Robin Brandt has not submitted such an exhibit. Accordingly, the applicant must file the appropriate exhibit with the presiding Administrative Law Judge within 30 days after this Order is released.

4. No determination has been reached that the tower height and location proposed by each applicant would not constitute a hazard to air navigation. Accordingly, an air hazard issue will be specified.

5. The effective radiated visual power, antenna height above average terrain and other technical data submitted by each applicant indicate that there would be a significant difference in the size of the area and population which would be served by each. Consequently, the areas and populations which would be within each predicted 64 dBu (Grade B) contour, together with the availability of other television service of Grade B or greater intensity, will be considered under the standard comparative issue for the purpose of determining whether a comparative preference should accrue to either of the applicants.

6. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant would serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, whether there is a reasonable possibility that the tower height and location proposed by each of the applicants would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

8. IT IS FURTHER ORDERED, That, in the event of a grant of the application of Audrey Osmundson, it will be conditioned as follows:

Prior to the commencement of operation of the television station authorized herein, permittee shall certify to the Commission that Audrey and Dean Osmundson have each divested themselves of all interest in and connection with the licensee of Station KDAO(AM), Marshalltown, Iowa.

9. IT IS FURTHER ORDERED, That Robin Brandt shall submit a response to Section IV, FCC Form 301, to the presiding Administrative Law Judge within 30 days after this Order is released.

10. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

11. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with

the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

12. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-58

In re Applications of

Don H. Martin, Jr. d/b/a J.R. BROADCASTING	File No. BPCT-870331KI
JAMES T. LEDFORD	File No. BPCT-870827KE
FAMILY GROUP BROADCASTING LTD., VII	File No. BPCT-870827KF

For Construction Permit
Salem, Indiana

HEARING DESIGNATION ORDER

Adopted: January 29, 1988; Released: February 23, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it the above-captioned mutually exclusive applications to construct a new commercial television station on Channel 58, Salem, Indiana.

2. No determination has been reached that the tower height and location proposed by each applicant would not constitute a hazard to air navigation. Accordingly, an appropriate issue will be specified.

3. James T. Ledford has failed to certify his financial qualifications. Mr. Ledford has indicated that financial commitments are in the process of being obtained. Mr. Ledford will be given 30 days from the release date of this Order to review his financial proposal in light of Commission requirements, to make any changes that may be necessary and, if appropriate, to submit a certification to the Administrative Law Judge in the manner called for in Section III, FCC Form 301, as to his financial qualifications. If the applicant cannot make the required certification, he shall so advise the Administrative Law Judge who shall then specify an appropriate issue.

4. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to each of the applicants whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, best serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

6. IT IS FURTHER ORDERED, That James T. Ledford shall submit a financial certification in the form required by Section III, FCC Form 301, or advise the presiding Administrative Law Judge that the certification cannot be made, as may be appropriate, within 30 days of the release of this Order.

7. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

8. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to its notice of appearance a remittance of $6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-60

In re Applications of

JEROME SWAIN File No. BPCT-870330KU

CLEMENT S. ROSS File No. BPCT-8703317L

For Construction Permit
Ft. Walton Beach, Florida

HEARING DESIGNATION ORDER)

Adopted: January 29, 1988; Released: February 23, 1988

By the Chief, Video Services Division:

1. The Commission, by the Chief, Video Services Division, acting pursuant to delegated authority, has before it: (1) the above-captioned mutually exclusive applications to construct a new commercial television station on Channel 58, Ft. Walton Beach, Florida; and (2) an objection by the Association of Maximum Service Telecasters, Inc. (AMST).

2. On May 29, 1987, AMST filed an informal objection to the application of Jerome Swain on the grounds that his proposed transmitter site would be 94.6 km from the site of Station WJTC(TV), channel 44, Pensacola, Florida, whereas Sections 73.610 and 73.698 of the Commission's Rules require a minimum separation of 95.7 km between UHF stations operating on channels 14 channels apart. Swain's site would, therefore, be short-spaced by 1.1 km. Accordingly, an issue will be specified to determine whether circumstances exist which would warrant a waiver of the Rules. Since an applicant who proposes a short-spaced site is required to make the threshold showing that no suitable fully-spaced site is available, the presiding Administrative Law Judge will, in assessing those circumstances, consider that fact that the other applicant in this proceeding has specified a fully-spaced site.

3. Section V-C, Page 3, FCC Form 301, and Section V-G, Page 2, FCC Form 301 require original signatures. Mr. Swain's application does not contain the required original signatures. Mr. Swain will be required to submit an amendment bearing original signatures to the presiding Administrative Law Judge within 30 days of the release of this Order.

4. Section II, Page 3, Item 6(b) inquires if the applicant or any party to the application has any interest in or connection with a broadcast application pending before the Commission. Mr. Swain has responded in the affirmative, but has failed to submit the required information. Mr. Swain will be required to submit an appropriate amendment stating any interests in any other broadcast applications pending before the Commission, within 30 days of the release of this Order.

5. Clement Ross failed to submit a complete certification as to his financial qualifications. Mr. Ross will be given 30 days from the release date of this Order to review his financial proposal in light of Commission requirements, to make any changes that may be necessary, and, if appropriate, to submit a certification to the Administrative Law Judge in the manner called for in Section III, FCC Form 301, as to his financial qualifications. If the applicant cannot make the required certification, he shall so advise the Administrative Law Judge who shall then specify an appropriate issue.

6. On June 26, 1985, the Commission issued a Public Notice (Mimeo No. 5421) requiring all applicants for new broadcast stations to certify that they have obtained reasonable assurance that their specified transmitter site will be available to them. Mr. Ross has not submitted such a certification. Accordingly, the applicant will be given 30 days from the date of release of this Order to file such a certification, in the form required by the Commission, with the presiding Administrative Law Judge. If Mr. Ross cannot make the certification, he shall so advise the Administrative Law Judge who shall then specify an appropriate issue.

7. No determination has been reached that the tower height and location proposed by Jerome Swain and Clement Ross would not each constitute a hazard to air navigation. Accordingly, an appropriate issue will be specified.

8. Except as indicated by the issues specified below, the applicants are qualified to construct and operate as proposed. Since the applications are mutually exclusive, the Commission is unable to make the statutory finding that their grant will serve the public interest, convenience, and necessity. Therefore, the applications must be designated for hearing in a consolidated proceeding on the issues specified below.

9. Accordingly, IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine with respect to Jerome Swain, whether the proposal is consistent with Sections 73.610 and 73.698 of the Commission's Rules and, if not, whether circumstances exist which would warrant waiver of the Rules.

2. To determine with respect to each of the applicants whether there is a reasonable possibility that the tower height and location proposed by each would constitute a hazard to air navigation.

3. To determine which of the proposals would, on a comparative basis, better serve the public interest.

4. To determine, in light of the evidence adduced pursuant to the foregoing issues, which of the applications should be granted.

10. IT IS FURTHER ORDERED, That Jerome Swain shall submit an amendment bearing original signatures as set out in paragraph 3, *supra*, to the presiding Administrative Law Judge within 30 days of the release of this Order.

11. IT IS FURTHER ORDERED, That Jerome Swain shall submit an appropriate amendment setting forth the information required by Section II, page 3, Item 6(b), FCC Form 301 relating to other broadcast applications pending before the Commission, to the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That Clement Ross shall submit a financial certification in the form required by Section III, FCC form 301, or advise the presiding Administrative Law Judge that the certification cannot be made, as may be appropriate, within 30 days of the release of this Order.

13. IT IS FURTHER ORDERED, That Clement Ross shall within 30 days after the release of this Order, file with the presiding Administrative Law Judge, a site availability certification, in the form required by the Commission, or advise the Administrative Law Judge that the certification cannot be made, as may be appropriate.

14. IT IS FURTHER ORDERED, That Association of Maximum Service Telecasters Inc. IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 1.

15. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY RESPONDENT to this proceeding with respect to issue 2.

16. IT IS FURTHER ORDERED, That to avail themselves of the opportunity to be heard, the applicants and the parties respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order. Each applicant shall attach to his notice of appearance a remittance of $6,000 as a hearing fee as required by Section 1.1104 of the Commission's Rules.

17. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Video Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-296

In the Matter of

Amendment of Section 73.202(b), RM-5902
Table of Allotments,
FM Broadcast Stations.
(Jacksonville, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: January 27, 1988; Released: February 22, 1988

By the Chief, Allocations Branch:

1. At the request of Winfas, Inc. (Winfas), the Commission has before it the *Notice of Proposed Rule Making*, 2 FCC Rcd 4737 (1987), proposing the substitution of Channel 254C1 for Channel 254C2 at Jacksonville, North Carolina, and the modification of its construction permit for Station WRCM to specify the higher powered channel. Comments were filed by the petitioner and by WCCB-TV, Inc. (WCCB), licensee of Station WKSI-FM, Greensboro, North Carolina. Reply comments were filed by the petitioner.

2. As stated in the *Notice*, Channel 254C1 can be allocated to Jacksonville in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.8 kilometers (12.3 miles) south to avoid a short-spacing to Station WNOR-FM, Channel 254B, Norfolk, Virginia; to the allocation and pending applications for Channel 257A at Grifton, North Carolina; and to the application of Station WKSI, Channel 254C1, Greensboro, North Carolina, specifying full Class C facilities.[1] We also noted that use of Channel 254C1 at the site specified in Station WRCM's outstanding construction permit would be short-spaced by 1.7 kilometers to the site specified in the then pending application by Station WKSI. Therefore, petitioner was requested to state whether it would relocate its transmitter to a site complying with the Commission's minimum distance separation requirements or seek a waiver at the application stage to operate from its current construction permit site.

3. In response, petitioner states that it will promptly file an application specifying the higher powered facilities, if Channel 254C1 is allocated to Jacksonville. It also agrees to relocate its transmitter to a non-short-spaced site or seek a waiver of the Commission's minimum distance separation requirements in order to operate from the site specified in its construction permit. WCCB does not oppose the allotment at Jacksonville if Winfas relocates its transmitter to a site which would not be short-spaced to Station WKSI. However, it states that it would strongly object to any request for a waiver of the minimum distance separation requirements, contending that such a request would be contrary to the public interest. Petitioner, in its reply comments, states that it has made no decision at this time whether to seek a waiver of the Commission's mileage separation requirements or to relocate its transmitter. Therefore, it argues that the objection is premature and should be rejected.

4. We believe that the public interest would be served by substituting Channel 254C1 for Channel 254C2, and the modification of Station WRCM's construction permit accordingly, since it could enable improved service to Jacksonville and its environs by Station WRCM. We also agree with petitioner that the objection of WCCB is premature. Petitioner has not sought a waiver of the rules at this time. Therefore, any objection which WCCB may have to the grant of such a waiver would be more appropriately filed at the application stage, if such a request is filed.

5. Channel 254C1 can be allocated to Jacksonville in compliance with the Commission's minimum distance separation requirements with a site restriction of 19.8 kilometers (12.3 miles) south.[2] As requested, we shall also modify the construction permit of Station WRCM to specify operation on Channel 254C1 in lieu of Channel 254C2.

6. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 7, 1988,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Jacksonville, North Carolina	222C2, 254C1, 288A

7. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the permit of Winfas, Inc. for Station WRCM, Jacksonville, North Carolina, IS MODIFIED effective **April 7, 1988,** to specify operation on Channel 254C1, in lieu of Channel 254C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a major change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Station WKSI's application has since been granted and a construction permit specifying Class C facilities (BPH870302MI) has been issued.

[2] The coordinates for this allotment are: North Latitude 34o, 34', 20"; West Longitude 77o, 23', 50".

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-64

In the Matter of

Amendment of Section 73.202(b),	RM-6184
Table of Allotments,	
FM Broadcast Stations.	
(Bolivar and Ava, Missouri)	

NOTICE OF PROPOSED RULE MAKING

Adopted: January 29, 1988; Released: February 23, 1988

By the Chief, Allocations Branch:

1. Before the Commission is a petition for rule making filed by KYOO Broadcasting Company (petitioner), requesting the substitution of FM Channel 290C2 for Channel 292A at Bolivar, Missouri. Petitioner also requests the modification of its license for Station KYOO-FM to specify operation on the higher class channel.

2. In support of its proposal, petitioner states that granting this request would enable Station KYOO-FM to provide a much needed Class C2 service to the Bolivar area. According to petitioner, KYOO-FM has experienced numerous instances of signal shadowing and distortions with the present facility and in order to service the entire community effectively, needs to upgrade the facility.

3. Channel 290C2 can be allocated to Bolivar in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 20.9 kilometers (13 miles) northeast of the community.[1] The site restriction will prevent a conflict with Station KMCK, Channel 289C, Siloam Springs, Arkansas. It would also be necessary to delete Channel 290A from Ava, Missouri. Channel 290A was allocated to Ava in MM Docket 84-231 and was made available for application in Window No. 30 (opened July 31, 1987 and closed September 10, 1987). One application has been filed by Corum Industries, Inc. (870910NI). Petitioner has proposed the substitution of Channel 222A for 290A at Ava. The proposed substitution at Ava can be accomplished in compliance with the minimum distance separation requirements at the current application site for Channel 290A. Therefore, we shall propose the substitution of FM Channel 222A for Channel 290A at Ava, Missouri, and in accordance with Commisison policy, retain the applicant's filing protection for Channel 290A when it amends to specify Channel 222A, since the class of channels are equivalent. *See , Phillipsburg, Kansas*, 48 FR 10844 (1983). It should also be noted that Mr. Joe Corum, applicant for Channel 290A at Ava, Missouri, has filed a letter in which he agrees to the substitution of channels. Petitioner has indicated a willingness to reimburse the applicant for Channel 290A at Ava, for all reasonable costs involved in changing frequencies.

4. As for the requested Bolivar upgrade, we shall propose to modify the license of Station KYOO-FM, Channel 292A, to specify operation on FM Channel 290C2 in accordance with Section 1.420(g) of the Commission's Rules.

5. In order to provide a wide coverage area station for the Bolivar area, the Commission PROPOSES TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Ava, Missouri	290A	222A
Bolivar, Missouri	292A	290C2

6. IT IS ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice* to the following:

Mr. Joe Corum
KKOZ Radio
Box 386
Ava, Missouri 65608
(applicant for Channel 290A at Ava)

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **April 15, 1988,** and reply comments on or before **May 2, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

KYOO Broadcasting Company
Mr. Melvin Pulley
304 E. Jackson
Bolivar, Missouri 65613

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making, other than comments officially filed

at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates used for Channel 290C2 at Bolivar are 37-42-33; 93-12-19.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-465

In re

Resolution of Interference
between UHF channels 14 and
69 and Adjacent-channel
Land Mobile Operations

AMENDMENT TO ORDER GRANTING REQUEST FOR EXTENSION OF TIME TO FILE COMMENTS

Adopted: January 21, 1988; Released: February 23, 1988

By the Chief, Mass Media Bureau:

On January 4, 1988, the Chief of the Mass Media Bureau adopted an *Order Granting Request for Extension of Time to File Comments in MM Docket No. 87-465. The Order* was adopted in response to a Motion for Extension of Time submitted by the Association of Maximum Service Telecasters (MST).

In the motion, MST requested a sixty-day extension, but specifically asked the Commission to set deadlines of February 17, 1988 for comments and March 2, 1988 for reply comments, which provided for only a thirty-day extension. The Mass Media Bureau granted MST's motion, and set filing deadlines of >February 17 and March 2 as requested by MST.

On the same day the Bureau adopted this Order, MST filed an errata to its motion for extension of time, pointing out the discrepency. MST stated that it intended to request deadlines of March 21, 1988 for comments, and April 4, 1988 for reply comments.

For the same reasons cited by MST in its original Motion we believe that it would be beneficial to allow MST the full sixty-day extension it originally intended to seek.

Accordingly, IT IS ORDERED that our Order adopted January 4, 1988 is amended by extending the deadline for filing comments to **March 21, 1988,** and for filing reply comments to **April 4, 1988.** This action is taken pursuant to authority provided in Section 4(i) of the Communications Act of 1934, as amended, and Section 0.283 of the Commission's rules.

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

CANNON'S POINT BROADCASTING COMPANY St. Simons Island, Georgia	**BC Docket No. 81-306** File No. BPH-800714AK
JAMES U. STEELE St. Simons Island, Georgia	**BC DOCKET NO. 81-307** File No. BPH-800930AE
DALE BELL St. Simons Island, Georgia	**BC DOCKET NO. 81-309** File No. BPH-801003AF

For Construction Permit for a New FM Broadcast Station

ORDER

Adopted: February 9, 1988; Released: February 23, 1988

By the Commission:

1. This proceeding involves mutually exclusive applications for a new FM broadcast station at St. Simons Island, Georgia. The Review Board granted the application of Dale Bell and denied the competing applications of Cannon's Point Broadcasting Company and James U. Steele. 93 FCC 2d 643, recon. denied, 94 FCC 2d 72 (Rev. Bd. 1983). By its Order, FCC 86-161 (released Apr. 13, 1984), the Commission upheld the Board's decision.

2. Steele filed an appeal from the Commission's ruling with the United States Court of Appeals for the District of Columbia Circuit.[1] *James U. Steele v. FCC*, No. 84-1176 (D.C. Cir. May 10, 1984). One issue raised on appeal by Steele was whether the Commission properly evaluated the applicants under the "integration of ownership and management" criterion, which included an award of a gender preference to Bell, the winning applicant.

3. In a 1985 decision, a divided three-judge panel of the Court of Appeals held that the Commission's policy according a gender preference in comparative licensing proceedings was invalid because it exceeded the Commission's statutory authority. *Steele v. FCC*, 770 F. 2d 1192 (D.C. Cir. 1985). The court *en banc* vacated the panel opinion and ordered rehearing. Order, No. 84-1176 (D.C. Cir. Oct. 31, 1985). Subsequently, the court granted the Commission's motion to remand the case in order to permit the agency to reexamine the bases for its minority and female preference policies, including the issue of whether there was a factual basis to establish a nexus between minority or female ownership and programming diversity. Order, No. 84-1176 (D.C. Cir. Oct. 9, 1986). On remand, the Commission initiated a notice of inquiry proceeding to consider these questions. *See Race and Gender Preferences*, 1 FCC Rcd 1315 (1986) (MM Docket No. 86-484), modified, 2 FCC Rcd 2377 (1987). In that notice, the Commission stated that it would hold in abeyance, pending the conclusion of its inquiry, all cases in which a racial, ethnic or gender preference could be dispositive.

4. On December 22, 1987, the President signed into law House Joint Resolution 395 which contained the appropriations legislation for the Commission for fiscal year 1988.[2] This legislation appropriated money for Commission salaries and expenses with the following pertinent proviso:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, *as amended*, 52 R.R.2d 1313 (1982) [sic][3] and *Mid - Florida Television Corp.*, 60 F.C.C. 2d 607 Rev. Bd. (1978) [sic],[4] which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

5. In compliance with this legislation, the Commission has ordered MM Docket No. 86-484 closed, thereby terminating the reexamination of its comparative licensing policies based on racial, ethnic or gender preferences. *Order*, FCC 88-17, adopted January 14, 1988. In order to comply with the legislation fully, the Commission also ordered that its comparative licensing policies based on racial, ethnic or gender preferences that were in effect prior to September 12, 1986, be reinstated and that the presiding Administrative Law Judges, the Review Board, and the Office of the General Counsel process all comparative licensing cases in a manner consistent with Commission policy in effect prior to September 12, 1986. *Id.*

6. ACCORDINGLY, IT IS ORDERED, That in view of the termination of MM Docket No. 86-484 and the Commission's reinstatement of its comparative policies, the instant proceeding IS REACTIVATED and the Commission *Order*, FCC 84-161, released April 13, 1984, upholding the Review Board decision granting Dale Bell's application IS REAFFIRMED, in compliance with the legislative directive set forth in House Joint Resolution 395, Pub. L. No. 100-202.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] Cannon's Point did not file an appeal and therefore the Commission's denial of its application has become final.

[2] *Making Further Continuing Appropriations* for Fiscal Year 1988 and for Other Purposes, Pub. L. No. 100-202 (signed Dec. 22, 1987).

[3] 52 RR 2d 1301 (1982).

[4] 69 FCC 2d 607 (Rev. Bd. 1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

METRO BROADCASTING, INC. Orlando, Florida	**MM DOCKET NO. 83-140** File No. BPCT-820707KE
RAINBOW BROADCASTING COMPANY Orlando, Florida	**MM DOCKET NO. 83-142** File No. BPCT-820909KF
WINTER PARK COMMUNICATIONS, INC. Winter Park, Florida	**MM DOCKET NO. 83-143** File No. BPCT-820909KV

For Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: February 9, 1988; Released: February 23, 1988

By the Commission:

1. This proceeding involves mutually exclusive applications for a new UHF television station on Channel 65 at Orlando/Winter Park, Florida. In an order released October 18, 1985, the Commission upheld a Review Board decision granting the application of Rainbow Broadcasting Company (Rainbow) and denying the applications of Metro Broadcasting, Inc. (Metro) and Winter Park Communications, Inc. (Winter Park). *Metro Broadcasting, Inc.*, 99 FCC 2d 688 (Rev. Bd. 1984), *rev. denied*, FCC 85-558, released October 18, 1985.

2. Metro and Winter Park filed appeals from the Commission's decision with the Court of Appeals for the District of Columbia Circuit. *Winter Park Communications, Inc. v. FCC*, No. 85-1755 (D.C. Cir.) and consolidated case. One issue raised on appeal was whether the Commission properly evaluated the applicants under the "integration of ownership and management" criterion, which included an award of a slight gender preference and substantial minority preference to Rainbow, the winning applicant.

3. In a 1985 decision, a divided three-judge panel of the Court of Appeals held that the Commission's policy applying a gender preference in comparative licensing proceedings was invalid because it exceeded the Commission's statutory authority. *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985), *vacated*, October 31, 1985, *remanded*, October 9, 1986. The Court *en banc* vacated the panel opinion and ordered rehearing. Subsequently, the court granted the Commission's motion to remand the case in order to permit the agency to reexamine the bases for its minority and female preference policies. On remand, the Commission initiated a notice of inquiry proceeding to consider these questions. *See Race and Gender Preferences*, 1 FCC Rcd 1315 (1986) (MM Docket No. 86-484), modified, 2 FCC Rcd 2377 (1987). In that notice, the Commission stated that it would hold in abeyance, pending the conclusion of its inquiry, all cases in which a preference could be dispositive.

4. In light of the remand in the *Steele* case, the Commission sought a remand of the record in the instant proceeding to determine whether the minority preference it had awarded to Rainbow was of decisional significance.[1] The Court granted the Commission's Motion for Remand and a related motion by Metro on November 5, 1986. On remand, the Commission concluded that deletion of Rainbow's minority and female preferences could reverse the outcome of this proceeding and result in an award to Metro. Accordingly, the Commission ordered this proceeding held in abeyance pending further action pursuant to the Commission's consideration of MM Docket No. 86-484. *Metro Broadcasting, Inc.*, 2 FCC Rcd 1474 (1987).

5. On December 22, 1987, the President signed into law House Joint Resolution 395 which contained the appropriations legislation for the Commission for fiscal year 1988.[2] This legislation appropriated money for Commission salaries and expenses with the following pertinent proviso:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C.2d 979 and 69 F.C.C.2d 1591, *as amended*, 52 R.R. 2d 1313 (1982) [sic] [3] and *Mid - Florida Television Corp.*, 60 F.C.C.2d 607 Rev. Bd. (1978) [sic],[4] which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

6. In compliance with this legislation, the Commission has ordered MM Docket No. 86-484 closed, thereby terminating the reexamination of its comparative licensing policies based on racial, ethnic or gender preferences. *Order*, FCC 88-17, adopted January 14, 1988. In order to comply with the legislation fully, the Commission also ordered that its comparative licensing policies based on racial, ethnic or gender preferences that were in effect prior to September 12, 1986, be reinstated and that the presiding Administrative Law Judges, the Review Board and the Office of the General Counsel process all comparative licensing cases in a manner consistent with Commission policy in effect prior to September 12, 1986. *Id.*

7. ACCORDINGLY, IT IS ORDERED, that in view of the termination of MM Docket No. 86-484 and the Commission's reinstatement of its comparative preference policy, the instant proceeding IS REACTIVATED and the Commission's *Order*, FCC 85-558, upholding the Review Board decision granting Rainbow Broadcasting Company's application IS REAFFIRMED, in compliance with the legislative directive set forth in House Joint Resolution 395, Pub. L. No. 100-202.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] The Commission already had determined in its October 1985 *Order* that even if no consideration were given to Rainbow's 5% female participation, it would not change the outcome of this proceeding. *Metro Broadcasting, Inc.*, FCC 85-558, 6 20. Therefore, only the minority preference was potentially dispositive.

[2] *Making Further Continuing* Appropriations for Fiscal Year 1988 and for Other Purposes, Pub. L. No. 100-202 (signed Dec. 22, 1987).

[3] 52 RR 2d 1301 (1982).

[4] 69 FCC 2d 607 (Rev. Bd. 1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

FAITH CENTER, INC. **BC DOCKET NO. 80-730**
Hartford, Connecticut File No. BRCT-348

For Renewal of License

ORDER

Adopted: February 9, 1988; Released: February 23, 1988

By the Commission:

1. This proceeding involves the application of Faith Center, Inc. for renewal of its license for the television station operating on UHF channel 18 at Hartford, Connecticut. By Memorandum Opinion and Order, 99 FCC 2d 1164 (1984), the Commission granted the request of Faith Center to assign the license for this television station to Astroline Communications Company Limited Partnership, pursuant to the Commission's distress sale policy announced in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978), revised, 92 FCC 2d 849 (1982). The Commission also denied the request of Shurberg Broadcasting of Hartford, Inc. to designate its application for a comparative renewal hearing together with Faith Center's renewal application to determine which applicant should operate a television station on Channel 18.

2. Shurberg filed an appeal of the Commission's decision with the United States Court of Appeals for the District of Columbia Circuit. *Shurberg Broadcasting of Hartford, Inc. v. FCC*, No. 84-1600 (D.C. Cir. Dec. 10, 1984). One issue raised on appeal by Shurberg was whether the Commission's distress sale policy is constitutional.

3. Thereafter, in a separate matter in 1985, a divided three-judge panel of the Court of Appeals held that the Commission's policy awarding a gender preference in comparative licensing proceedings was invalid because it exceeded the Commission's statutory authority. *Steele v. FCC*, 770 F.2d 1192 (D.C. Cir. 1985). The Court *en banc* vacated the panel opinion and ordered rehearing. Order, No. 84-1176 (D.C. Cir. Oct. 31, 1985). Subsequently, the court granted the Commission's motion to remand the case in order to permit the agency to reexamine the bases for its minority and female preference policies. Order, No. 84-1176 (D.C. Cir. Oct. 9, 1986). On remand, the Commission initiated a notice of inquiry proceeding to consider these questions. *See Race and Gender Preferences*, 1 FCC Rcd 1315 (1986) (MM Docket No. 86-484), modified, 2 FCC Rcd 2377 (1987). In that notice, the Commission stated that it would hold in abeyance, pending the conclusion of its inquiry, all cases in which a racial, ethnic or gender preference could be dispositive.

4. Following the remand of the *Steele* case, the *Shurberg* panel asked the Commission to submit a brief setting forth its position on the constitutionality of the distress sale policy. In light of the then planned inquiry on comparative preferences and the fact that many of the same issues were presented by the distress sale policy, the Commission sought a remand of the record in the instant proceeding to consider the justification for the distress sale policy in MM Docket No. 86- 484. On June 25, 1987, the Court remanded this proceeding to the Commission.

5. On December 22, 1987, the President signed into law House Joint Resolution 395 which contained the appropriations legislation for the Commission for fiscal year 1988.[1] This legislation appropriated money for Commission salaries and expenses with the following pertinent proviso:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a reexamination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to expand minority and women ownership of broadcasting licenses, including those established in *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 F.C.C. 2d 979 and 69 F.C.C. 2d 1591, *as amended*, 52 R.R.2d 1313 (1982) [sic][2] and *Mid - Florida Television Corp.*, 60 F.C.C. 2d 607 Rev. Bd. (1978) [sic],[3] which were effective prior to September 12, 1986, other than to close MM Docket No. 86-484 with a reinstatement of prior policy and a lifting of suspension of any sales, licenses, applications, or proceedings, which were suspended pending the conclusion of the inquiry.

6. In compliance with this legislation, the Commission has ordered MM Docket No. 86-484 closed, thereby terminating the reexamination of its licensing policies based on racial, ethnic or gender preferences. *Order*, FCC 88-17, adopted January 14, 1988. In order to comply with the legislation fully, the Commission also ordered that its licensing policies based on racial, ethnic or gender preferences that were in effect prior to September 12, 1986, be reinstated and that the presiding Administrative Law Judges, the Review Board, and the Office of the General Counsel process all licensing cases in a manner consistent with Commission policy in effect prior to September 12, 1986. *Id.*

7. ACCORDINGLY, IT IS ORDERED, That in view of the termination of MM Docket No. 86-484 and the Commission's reinstatement of its distress sale policy, the instant proceeding IS REACTIVATED and the Commission's ruling, 99 FCC 2d 1164 (1984), granting Faith Center's request to assign Channel 18 to Astroline IS REAFFIRMED, in compliance with the legislative directive set forth in House Joint Resolution 395, Pub. L. No. 100-202.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] *Making Further Continuing Appropriations* for Fiscal Year 1988 and for Other Purposes, Pub. L. No. 100-202 (signed Dec. 22, 1987).

[2] 52 RR 2d 1301 (1982).

[3] 69 FCC 2d 607 (Rev. Bd. 1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-170

In re Applications of

OMAHA CHANNEL 54 BROADCASTING GROUP, LIMITED PARTNERSHIP — File No. BPCT-840921LG

OMAHA TELECASTERS, INC. — File No. BPCT-850108K0

Construction Permit for a New Television Station
Omaha, Nebraska

Appearances

Thomas L. Root and Jill L. Rygwalski, on behalf of Omaha Channel 54 Broadcasting Group, Limited Partnership; *Janet M. Evans, Kathryn R. Schmeltzer and Martin R. Leader,* on behalf of Omaha Telecasters, Inc.

DECISION

Adopted: January 28, 1988; Released: February 25, 1988

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN. (Board Member Blumenthal issuing a concurring statement).

Board Member ESBENSEN:

1. Two mutually-exclusive applicants remain in this proceeding both proposing to construct and operate a new UHF television facility on Channel 54 at Omaha, Nebraska: Omaha Channel 54 Broadcasting Group (Channel 54) and Omaha Telecasters, Inc. (Telecasters). Both applicants were found unqualified to be Commission licensees by Deputy Chief Administrative Law Judge James F. Tierney (ALJ) in his *Initial Decision,* 2 FCC Rcd 4760 (1987).

2. By *Hearing Designation Order* (HDO), 50 Fed. Reg. 28018, July 9, 1985, these applications, along with two others subsequently dismissed, were designated for consolidated hearing on the standard comparative issue, as well as an air hazard issue with respect to the application of Channel 54. Subsequent issues concerning site availability in another adjudicatory proceeding, and the reporting and disclosure of required information (both relating to basic qualifications) were added against Channel 54. The ALJ made adverse findings against Channel 54 in all material respects on all these latter issues and concluded that Channel 54 was not qualified to be a Commission licensee. In spite of the fact that the only issue outstanding with respect to Telecasters was the standard comparative issue, the ALJ determined, in essence, that Telecasters was a "sham" of such magnitude that it also warranted disqualification.

3. Before the Review Board are the exceptions to the I.D. filed by both parties, as well as their respective reply pleadings. We have reviewed the I.D. in light of the pleadings, the oral argument (at which only Telecasters appeared) held December 18, 1987, [1] and our independent examination of the record. We adopt the findings of fact and conclusions of law of the ALJ, except as modified herein, with respect to Channel 54 and affirm the disqualification of that applicant. However, for the reasons discussed hereinbelow, we reverse the ALJ's disqualification of Telecasters and grant its application.

4. *Telecasters:* In light of the fact that we affirm (as discussed, *infra)* the ALJ's determination that Channel 54 is technically (and otherwise) unqualified to be a Commission licensee, see 47 U.S.C. §308(b), the sole remaining question is whether Telecasters *is* equally unqualified, but for different reasons. It is no wonder that this proceeding is in its present posture before us. Principally because of imprecise and careless pleading before us and the ALJ by both parties, and the similar imprecise submission of record evidence before the ALJ, has this case devolved to its present nadir.

5. The ALJ apparently determined that Telecasters' proposal to integrate only its Class A shareholders (who own 34.5% of the equity of the applicant) was a "sham" of such magnitude "... since the real full-power' rests with the 100% owners of Class B stock" (who own 65.5% equity)(I.D., para. 96), that Telecasters was not qualified to be a licensee. While no disqualifying issues were added or tried against Telecasters, the ALJ nonetheless concluded (I.D., para. 94; emphases added):

> "Channel 54, noting also that it has sought no integration credit, its general partner having withdrawn her integration proposal urges that Telecasters, too, is entitled to no quantitative integration credit. Channel 54 adds that no evidence appears distinguishing between the voting powers of the Class A and the Class B shareholders; *that there is no indication of what percentage of the total equity of the corporation is owned by each of the Class A and Class B shareholders;* having failed in demonstrating *"prima facie"* that it is entitled to integration, says Channel 54, "[i]t is simply out of luck," citing *Kennebec Valley Television, Inc.* (FCC 87-5, released February 26, 1987); lacking also any evidence that the Class B shareholders " *are passive (non-voting) participants in the applicant or have anything less than total control,* that no Class B shareholder is proposed for integration," Channel 54 adds. These facts compound the notion that Telecasters is not entitled to any integration credit, Channel 54 concludes. The evidence in these Channel 54 observations is eminently clear and Channel 54's observations are persuasive and convincing."

6. In its exceptions, and again at oral argument, Telecasters endeavored to correct what it considered to be a factual misperception on the part of the ALJ (and Channel 54) that it was, and remains, a two-tiered corporation with both voting *and* non-voting stockholders; an organizational form that is frequently asserted by applicants in contemporary comparative hearings. However, running

against this trend, Telecasters here claims that *all of its stock*, both Class A and Class B, has always been only *voting* stock, and that, in essence, its ownership structure has always been precisely as claimed: A corporation in which individuals holding 34.5% of the total equity of the corporation (in Class A voting stock) would be "integrated" into the active management of the proposed facility and those with 65.5% of the total corporate equity (in Class B *voting* stock) would not. Thus, Telecasters, in essence, concedes that obvious "control" of the corporation would repose in the Class B *voting* shareholders in light of their 65.5% ownership of the total equity of the corporate applicant, but asserts that it is only seeking 34.5% integration credit. In support of this position, both at oral argument and in its exceptions *(see,* e.g., Telecasters' Exceptions, para. 13), Telecasters references its Exhibit 1 and various citations to the transcript below. However, our examination of those transcript citations and exhibits yielded no conclusive support for Telecasters' position. We also examined prior to oral argument (and take official notice thereof) the original application (FCC Form 301), and an amendment thereto, filed by Telecasters. In response to the showing required under "Legal Qualifications" (FCC Form 301, Section II, Table I), wherein a specific disclosure of voting stock ("VS") is mandatory, Telecasters did indicate that the Class A shareholders held "VS" or voting shares of stock; with respect to the Class B shareholders, the appropriate column in FCC Form 301 was merely left blank.

7. When confronted with these discrepancies at oral argument, Telecasters was unable to satisfactorily resolve our questions; however, counsel did point out that Telecasters' Articles of Incorporation, and an amendment thereto, (which disclosed, on their face, that all classes of stock were voting shares) were made available to all parties (and the ALJ) during the pre-hearing discovery phase of this proceeding, and that Channel 54 utilized the Articles during cross-examination of Telecasters' principals at hearing (Tr. 438).[2] Thus, we requested Telecasters to supplement the record herein by the submission of copies of the Articles of Incorporation, and amendments thereto. Telecasters' timely filed this data; Channel 54 has not objected to, or filed comments, with respect to this submission of Telecasters. We observe that Telecasters' Articles reveal that since its corporate inception, all Telecasters' stock, of all classes, has been, and is, voting stock. Thus, on the basis of the application, the pleadings filed and the Articles of Incorporation tendered (of which we take official notice), we find no substantial and material questions of fact that would require a remand of this proceeding for further hearings. *Cf* . Sections 309(d)(2) and (e) of the Communications Act of 1934, as amended.

8. Turning back to the ALJ's disqualification of Telecasters (absent a specific misrepresentation or other basic qualifications issue), we recently observed in another proceeding (wherein an ALJ had refused to grant a settlement agreement, finding, also absent an appropriate issue, that the principals of the applicant who would emerge with the construction permit were "unreliable" and "untruthful" and thus unqualified) that:

> " ...the ineluctable conclusion must be drawn that, under current Commission precedent, even completely negativing the credibility or viability of an integration proposal cannot be equated with disqualifying the putative malfeasor. At minimum, an appropriate disqualifying issue must first be designated; and at maximum, an intent to deceive, which lies at the core of all misrepresentation-like issues, must be proven."

Tequesta Television, Inc., (FCC 87R-63, released December 10, 1987, at para. 6). Succinctly, we cannot find a sufficient basis upon which to order a remand to the Presiding Officer with the designation of a specific misrepresentation or similar issue. See *e.g. Susan Mulkey*, FCC 87R-72, adopted December 22, 1987, at paras. 16-19. In light of the exchange of Telecasters' Articles of Incorporation in which its corporate structure was clearly disclosed prior to commencement of the hearing proceedings, we cannot find *any intent* to deceive by Telecasters. Thus, there has been no misrepresentation.[3] Therefore, we reverse the ALJ's disqualification of Telecasters, and award it the 34.5% integration credit claimed.

9. *Channel 54* . We agree with the ALJ that Channel 54 must be totally disqualified on the air hazard issue. Channel 54 here proposes to locate its transmitter near Springville School Road, northeast of Omaha, Nebraska; it proposes facilities with an overall antenna height of 550 feet above ground level (AGL). Initially, the Federal Aviation Administration (FAA) did issue to Channel 54 a "Determination of No Hazard" for its proposed antenna and tower site. (FAA Form 7460-9, issued October 24, 1984; Channel 54 Exh. 4). However, that determination clearly and specifically limited Channel 54 to an overall tower height of 500 feet above ground, not the 550 feet proposed. Channel 54 did not, in the wake of the FAA ruling, amend its application to reduce its proposed tower to 500 feet above ground. Instead, it subsequently requested FAA approval for a 549-foot tower at the same site. In response, on December 30, 1985, the FAA issued an "Aeronautical Study of Proposed Construction or Alteration" regarding this revised request. (FAA Form 7460-8, issued December 30, 1985; Telecasters' Exh. 25). The FAA there indicated that Channel 54's proposed structure was located 5.11 nautical miles WNW of Eppley Air Field in Omaha, and that, therefore, the Channel 54 proposal *exceeded by 138 feet the standards for structures located within 6 miles of airport facilities*. I.D., paras. 19-20. Despite the FAA's actions, Channel 54 *again* did not seek to amend its application. Even today, over *three years* after the FAA notified Channel 54 that its maximum tower height could not exceed 500' AGL, it attempts to prosecute its application with a tower height lacking the necessary FAA approval. Of course, by this point in time (as Channel 54 readily admits in its Exceptions) any attempt to amend its application would be required to be accompanied by the "good cause" showing required pursuant to 47 CFR §73.3522(b)(1)(i). *See generally California Broadcasting Corp.*, 90 FCC 2d 800 (1982); *Royce Int'l Broadcasting Co.* v. *FCC*, 762 F.2d 138 (D.C. Cir. 1985) (mem.); *Dutchess Communications Corp.*, 101 FCC 2d 243 (Rev. Bd. 1985); *Cannon Communications Corp.*, 101 FCC 2d 169 (Rev. Bd. 1985); *rev. denied*, FCC 86-244, released May 15, 1986;; *Houston Family Television, Ltd.*, 101 FCC 2d 661 (Rev. Bd. 1985) (applications for review pending). And, as Channel 54 further concedes in its Exceptions (para. 6) it is now patently "lacking the ability" to make such a "good cause showing.

10. We will affirm the ALJ's disqualification of Channel 54 with respect to the air hazard issue. It is obvious that Channel 54 has failed to meet either its burden of proceeding or proof pursuant to Section 309(e) of the Communications Act of 1934, as amended, 47 U.S.C. 309(e), to demonstrate that its proposed antenna structure would not be a hazard to air navigation. *Victory Media, Inc.*, 2 FCC Rcd 1759 (Rev. Bd. 1987). In *Victory Media* the Board emphatically rejected an argument repeated here by Channel 54, that an applicant continuing to protest the denial of FAA clearance may, without more, be found qualified on a designated air hazard issue. Like the disqualified applicant in *Victory Media, supra,* Channel 54 has supplied no evidence to suggest that the FAA is contemplating a reversal of its prior determinations. Thus it is unarguable that Channel 54 cannot effectuate its technical proposal, even if we were to otherwise grant its application. The ALJ's disqualification of Channel 54 was not only correct, but mandatory. One final note on Channel 54's persistence in continuing to prosecute an application utterly bereft of the requisite FAA approval: This is at least the third recent case in which applicants represented by this same attorney have appeared on appeal before this Board in an identically impermissible posture. *See Victory Media, supra; see also Neil I. Sanders,* 102 FCC 2d 865 (Rev. Bd. 1985). In *Sanders* the Board admonished counsel of the requirements of 47 CFR §1.52, and chastened counsel about continuing to prosecute the application of a client properly found below not to possess the requisite FAA clearance for its proposed antenna. *See* 102 FCC 2d 869 at n.8. Undaunted, counsel for Channel 54 again mounts the same dead horse. While applicants and counsel are absolutely free to proceed upon a theory of law previously rejected by this Board, and to thereby maintain a position for the perfectly legitimate purpose of potential relief on appeal, we believe that the position taken again here by Channel 54 is so close to frivolous as to raise serious questions as to the "legitimate purpose" of its pleadings. As we observed in *Sanders, supra,* at 102 FCC 2d 868, "[Sanders'] brief is appalling as, indeed, is his continued presence before this Commission." The public has a right to the benefits of a new broadcast service, undelayed by the machinations of patently unqualified applicants, whose persistence may be inspired as much by its nuisance value (perhaps for nothing more than settlement purposes) as its desire to vindicate noble legal rights and principles.

11. In light of the fact that Channel 54 has been terminally disqualified on the air hazard issue alone, it is not necessary to additionally burden the record herein by belaboring each of its other delicts. Nevertheless, the ALJ's findings with respect to the failure of Channel 54 to comply with even the most basic and rudimentary rules and regulations of the Commission are noteworthy.

12. By *Memorandum Opinion and Order,* FCC 85M-3877, released October 3, 1985, the ALJ added issues (as noted *supra,* para. 2, concerning Section 1.65 violations and site availability representations in another proceeding) against Channel 54. Thereafter, by *Memorandum Opinion and Order,* FCC 86M-1930 (released June 12, 1986), the ALJ also added the following specific qualifying issue against Channel 54:

> To determine whether Channel 54 has violated Rule 1.65 in repeatedly failing to report the imposition of adverse issues against it or its principals in other proceedings; and whether Channel 54 has failed fully to comply with valid discovery requests; and in light of the evidence adduced thereunder, whether Channel 54 is basically qualified to be a Commission licensee.

In his I.D., the ALJ set forth in painstaking detail the numerous and repeated failures of Channel 54 to report matters required pursuant to Section 1.65 of the Commission's Rules. We need not repeat all these findings herein, but specifically adopt the ALJ's findings relating to Channel 54's failure to report other matters, including *inter alia,* other broadcast interests of Wilbur Colom's family (I.D., para. 22); Colom's interests in an Oxford, Mississippi application (I.D., paras. 24-25); changes in media interests arising in a Santa Barbara, California proceeding and a pending application for Holly Springs, Mississippi (I.D., paras. 28-29); a grant to a Colom-related organization in Albany, Georgia (I.D., para. 30); as well as the addition of qualifying issues in a Seattle, Washington proceeding (I.D., para. 34).

13. More importantly, Channel 54 also failed on other occasions to report in a timely and complete manner the fact that significant issues were added against its principals in other proceedings. Wilbur Colom and Congress Street were principals of Nashville TV 58, Inc. (TV 58), an applicant for a new television facility on Channel 58 in Nashville, Tennessee. While that application was pending, a Motion to Enlarge Issues was filed alleging that TV 58 did not have reasonable assurance of the availability of its specified transmitter site. In November 1984, TV 58 requested dismissal of its application. That motion was granted and the dismissal order noted that "the matters presented in the Motion to Enlarge Issues may be considered in another proceeding pursuant to the procedure set forth in *Allegan County Broadcasters,* Inc., 83 FCC 2d 371, 373 (1980)." *Ruth Payne Carmen (Memorandum Opinion and Order),* FCC 84M-4931, released November 26, 1984 (I.D., para. 31). At the time of the TV 58 dismissal, Wilbur Colom was the president of Channel 54. [4] Colom acknowledged that it is "very likely" that he saw the Nashville dismissal order. Nevertheless, the Channel 54 application was not promptly amended to reflect this dismissal. The first amendment which reflected the Nashville dismissal at all was filed *fourteen months thereafter,* in March 1986. That amendment did *not* disclose the site matter or the terms of the dismissal order. At hearing, Colom characterized the Nashville site matter as "not very important" (Tr. 142-143). He said it "didn't concern" him (Tr. 142). (I.D., paras. 32-33).

14. Channel 54 also failed to timely and accurately report the addition of three issues against a related Tulsa, Oklahoma applicant. Wilbur Colom and Congress Street Properties were principals of Tulsa Broadcasting Group, (TBG) an applicant for a new television station construction permit proposing to operate on Channel 53 at Tulsa, Oklahoma. Misrepresentation and financial qualifications issues were added against TBG by *Memorandum Opinion and Order,* FCC 86M-777, released March 3, 1986. (I.D., para. 35). In an *Initial Decision,* 2 FCC Rcd 1149 (1987), the Presiding Officer in that proceeding (disqualified TBG on financial and misrepresentation/lack of candor issues. By Decision released October 9, 1987, 2 FCC Rcd 6124 (Rev. Bd. 1987) we affirmed the ALJ in all pertinent respects, and *inter alia,* specifically declared that Wilbur Colom had falsely certified TBG's application. In the pro-

ceeding herein, the ALJ found that Channel 54 had not reported the Tulsa *Initial Decision* or the adverse findings made regarding Colom. Indeed, Channel 54 has not proffered any amendment to its instant application to reflect the results of our *Decision, supra,* even to this date.

15. In addition to the foregoing, there are some even more serious matters which bear scrutiny. In August 1985, Telecasters requested Channel 54 to produce all documents relating to the air hazard issue designated against Channel 54 in the HDO. In its October 8, 1985 response, Channel 54 represented that the only existing document relevant to the air hazard issue was the Notice of Proposed Construction which had been attached to Channel 54's application, as originally filed. However, as noted *supra,* para. 9, there existed on the date of Channel 54's response a Determination of No Hazard to Air Navigation issued by the FAA in October 1984. This Determination limited Channel 54's tower height to a level some 50 feet lower than that specified in Channel 54's application. Channel 54 revealed the existence of the FAA Determination to the Presiding Officer and to Telecasters on February 3, 1986, when Channel 54 exhibits 1-4 were exchanged. Thus, the October 1984 FAA Determination was not produced until *after* Telecasters and Channel 54 had joined together in the submission of Joint Exhibit 1, which constituted the comparative coverage showings of the two applicants. (I.D., paras. 39-40).

16. Also, by motion dated August 8, 1985, Telecasters requested Channel 54 to produce documents related to the formation, ownership, control and future ownership of Channel 54. Telecasters' request defined "documents" to include drafts of such documents, and stated that the request was continuing in nature. Channel 54 agreed to produce all requested documents and on October 8, 1985, Channel 54 submitted its response. Channel 54 represented that with the exception of Channel 54's Application and the Channel 54 Limited Partnership Agreement there existed no documents falling within the above categories. However, at the time of Channel 54's response, there existed a March 1984 agreement between Colom and Congress Street Properties. This Agreement, which was admitted at hearing as Telecasters Ex. 17, was the culmination of discussions between Colom and Leland Speed, president of Congress Street, which took place in 1983-1984. Colom had proposed to Speed that Congress Street and Colom, together, should file for television permits; Colom drafted an agreement to this end in February 1984. After editing by Congress Street's attorneys, the agreement was signed by Colom and Congress Street in March 1984. Following the signing of the agreement, Colom and Congress Street went on to file at least nine UHF television station applications for locations around the country, including Omaha and Tulsa. Further, in response, Channel 54 also represented that the Channel 54 application was completely responsive to this discovery request. However, the March 1984 agreement provided that Colom and Congress Street would file up to 20 UHF television station applications. Telecasters recited lengthy factual conditions and circumstances attending Channel 54's failure to produce documents and serious imperfections in Channel 54's responses. For example, some of the requests related to: (a) Channel 54,s plans or proposals to sell, transfer or dispose of any interest in Channel 54; (b) Channel 54's past or present organization, management or functioning of Channel 54; (c) and, its planned distribution of profits, and compensation in the event of grant. In addition to merely stating that no such requested documents existed, Channel 54 further simply defended its position before the ALJ by claiming that the Channel 54 Limited Partnership Agreement was responsive to the requests. (I.D., paras. 41-44).

17. In defense of its delicts, Channel 54 attempts to explain away its multiple omissions, and failure to disclose relevant data, as mere "oversights" (Exceptions, para. 9); "inadvertent omissions" *(id.,* para. 10); or as "sloppy" *(id.,* at para. 21); or simply "mistakes" resulting from "not prosecut[ing] its application with perfection" (*id.,* para. 28); or, as information not required by FCC Form 301 (and, thus, not required to be reported pursuant to Section 1.65 of the Commission's Rules, 47 C.F.R. 1.65)(*id.,* paras. 13, 16-18). With respect to this latter defense of Channel 54, we simply note that it is axiomatic that Section 1.65 of the Commission's Rules requires, by its plain terms, full disclosure of "any other matter" which may be of decisional significance (as well as the updating of previously reported data). Thus, Section 1.65 clearly contemplates the submission of data not necessarily requested on FCC Form 301, if such data could be of potential decisional significance. *See, Las Americas Communications, Inc.,* 1 FCC Rcd 786 (Rev. Bd. 1986); *Mid-Ohio Communications, Inc.,* 104 FCC 2d 572 (Rev. Bd. 1986). We hold that the record evidence herein demonstrates that Channel 54 knowingly, deliberately and repeatedly withheld, and failed to report, matters of decisional significance, and has deliberately failed to comply with valid discovery requests in this proceeding. Its motive is readily apparent: The disclosure of such data could have materially affected the outcome of this proceeding to the detriment of Channel 54.

18. In its policy *Regarding Character Qualifications in Broadcast Licensing,* 102 FCC 2d 1179 (1986); the Commission stated that inquiries into an applicant's basic qualifications and character should focus on the likelihood that an applicant can be relied upon and will deal truthfully with the Commission and comply with the Communications Act and its Rules and policies. Channel 54's conduct in this proceeding does not auger well for its dependability and reliability as a Commission licensee. During the course of the proceeding, Channel 54 was presented with *multiple* situations in which it was required to voluntarily report matters or respond to discovery requests and other inquiries. However, it repeatedly failed to do so in a timely and/or accurate manner.

19. Thus, we must conclude that the concatenation of facts and circumstances here present (the repeated violations of Section 1.65 of the Commission's Rules *plus* the failure to comply with valid discovery requests) demonstrates that Channel 54 willfully and repeatedly intended to deceive the ALJ, Telecasters, and the Commission. It is well-settled that in order to discharge its duties effectively, "the Commission must, of necessity, rely upon the statements and submissions of its licensees .... The fundamental importance of truthfulness and complete candor on the part of applicants, as well as licensees, in their dealings with the Commission is well established." *Lebanon Valley Radio, Inc.,* 35 FCC 2d 243, 258 (Rev. Bd. 1972), *review denied,* 39 FCC 2d 1099 (1973), *rev'd on other grounds sub nom., Lebanon Valley Radio, Inc. v. FCC,* 503 f.2d 196 (D.C. Cir. 1974). *See also FCC v. WOKO, Inc.,* 329 U.S. 223, 227 (1946). Since the Commission must license thousands of radio and television stations in the public interest, it must therefore rely substantially on the completeness

and accuracy of the submissions made to it. *WHW Enterprises, Inc. v. FCC,* 753 F.2d 1132 1139 (D.C. Cir. 1985); *RKO General, Inc. v. FCC,* 670 F.2d 215, 232 (D.C. Cir. 1981), *cert. denied* 456 U.S. 927 (1982). It is manifest that applicants before the Commission "have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate." *Id.* at 232. Herein, the record evidence, as a whole, establishes that Channel 54 conducted a pattern of deliberate and repeated violations of Section 1.65 of the Commission's Rules, and failed to comply with reasonable requests for discovery. Moreover, these violations undermined the administrative fairness in the comparative hearing proceeding by withholding pertinent information about Channel 54 from the Commission and Telecasters during the hearing proceedings. *See Bay Television, Inc.,* 95 FCC 2d 181 (Rev. Bd. 1983), *review denied,* FCC 85-58, released March 25, 1985, *aff'd by judgment (mem.) sub nom.* Home TV, Inc. v. FCC, No. 85-1256 (D.C. Cir. March 27, 1986); Mid-Ohio *Communications, Inc.,* 104 FCC 2d 572 (Rev. Bd. 1986). Indeed, the submission of misleading or untruthful responses to discovery requests is fully as serious as an untruthful response made directly to the Commission and, standing alone, can lead to disqualification. *WNST Radio,* 70 FCC 2d 1036 (Rev. Bd. 1978); *see Lee Optical and Associated Cos.,* 2 FCC 2d Rcd 5480, 5482 Rev. Bd. 1987); *California Broadcasting Corp.,* 2 FCC 4175, 4197 n. 28 (Rev. Bd. 1987). Channel 54 has amply demonstrated that it does not possess the requisite qualifications to be a licensee of this Commission.

20. Since there is only one qualified applicant remaining in this proceeding (Telecasters), and Channel 54 has been disqualified on multiple grounds, it is not necessary to examine the comparative considerations of the applicants. Nonetheless, we note that even if Channel 54 were found to be qualified, Telecasters would be the comparative clear winner because its principals would receive 34.5% integration credit versus Channel 54's 0%. [5]

21. ACCORDINGLY, IT IS ORDERED, That Omaha Telecasters, Inc.'s Petition for Leave to Amend, filed August 19, 1987, IS GRANTED, and the amendment IS ACCEPTED; and,

22. IT IS FURTHER ORDERED That, the application of Omaha Channel 54 Broadcasting Group, a Limited Partnership (File No. BPCT-840921LG) is DENIED; and the application of Omaha Telecasters, Inc., for a new UHF Television station at Omaha, Nebraska (File No. BPCT-850108KQ) is GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

FOOTNOTES

[1] Telecasters timely filed a request for oral argument, and Channel 54 notified us that it intended to participate at the oral argument. Subsequent to our scheduling oral argument on December 4, 1987, Telecasters filed a request to reschedule same on December 18, 1987, claiming that counsel for Telecasters would be absent Washington, D.C., on the originally-scheduled date. Additionally, Telecasters notified us of a telephonic conversation held with counsel for Channel 54 (Thomas L. Root) concerning the requested rescheduling. Through Telecasters, Root claimed that December 4 would similarly be unsuitable for him because of an impending birth in his family and that December 18 would be his first available date since he was also involved in a nine-party comparative hearing commencing the week of December 7, 1987. Based on these representations, we rescheduled the oral argument in this proceeding for December 18, 1987. However, on that date, only counsel for Telecasters appeared. We delayed commencement of the argument to inquire as to the whereabouts of Mr. Root. He returned a call to the Review Board offices and claimed that he had no intention of participating in the oral argument and that Channel 54 would rest on its pleadings. We do not fault Channel 54 for these actions of its counsel and our decision herein is not affected thereby; however, such conduct is, at the very least, manifestly inappropriate. This proceeding has been unnecessarily prolonged and taxpayer's money wasted by the actions of one individual.

[2] Even though counsel for Channel 54 apparently utilized the Telecasters Articles of Incorporation during cross-examination in this proceeding, and was thus on notice that all shares of Telecasters stock were voting shares, Channel 54 persists in its exceptions that "Telecasters failed to demonstrate the percentage of ownership equity held by each class of stock, [and] *which class of stock has voting powers and which does not ....*" (Channel 54 Exceptions, para. 38,; emphasis added).

[3] As noted in the text, there appeared, at first blush, to be an evident conflict between Telecasters' application, which plainly identifies its "Class A" shareholders as "voting" and its "Class B" shareholders as something other than voting - perhaps, even, non-voting - - and its Articles of Incorporation which plainly identifies both classes of stockholders as "voting." The obvious question arose as to whether this patent conflict reveals an unintentional misrepresentation or merely a "mistake". But for the fact that Telecasters had openly and promptly exchanged its Articles of Incorporation, after which no attempt to seek an extrapolated 100% integration credit was made by it, we would have reacted to this conflict in a manner similar to that of the ALJ. Something here was obviously amiss. And yet, considering Telecasters' routine production of the Articles and the examination of the principals being consistent therewith, we can hardly charge it with either misrepresentation or lack of candor. There was, simply put, no deception; and any initial intent to deceive would be, at this point virtually impossible to prove. Consequently, while we sharply reject Telecasters' assertion that its representations in this proceeding as to the "voting" "nonvoting" status of its two classes of stockholders have been *consistent,* we find no intent deceive.

[4] On February 28, 1985, the "B cut-off" date in this proceeding, the Channel 54 application was amended to "assign" the corporate applicant to a "limited partnership" (the applicant herein) in which Wilbur O. Colom is a "limited" partner with a 45% equity interest and Congress Street Properties, Inc., is also a 45% equity "limited" partner.

[5] Channel 54 specifically stated that it would seek no integration credit. (I.D., para. 94).

CONCURRING STATEMENT OF BOARD MEMBER NORMAN B. BLUMENTHAL

Although I ultimately concur in the result in this case because there is no clear evidence of an attempt on the part of Omaha Telecasters to "upgrade" its application or to conceal its true ownership structure, I reject as dis-

ingenuous its assertion that its Articles of Incorporation do not flatly contradict its own filed FCC Application Form 301. That application plainly, and in painstaking accord with the Commission's written instruction on the form itself, denominates purposefully only its Class A stockholders as "voting stockholders" with the specified "(VS)" symbol; and - again in letter-perfect consonance with the form's written instructions - separately and purposefully lists its Class B shareholders *without* the Commission's prescribed "voting shareholders" ("(VS)") designation. However, the Articles of Incorporation describe *both* classes of shareholders (A & B) as "voting." It nonetheless insists that it has *always* represented *all* of its shareholders as "voting."

Rather than providing us with a plausible explanation of the patent conflict between its FCC application and its corporate Acticles, Omaha Telecasters chose here to stonewall, and to deny categorically what is facially apparent. The unfortunate result may be to unavoidably call into question its general credibility, as it did before the ALJ. If it should suffer down the line as a result of its strategy, it will have only itself to blame. "Confession and avoidance." would have been the far better course.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 84-293

In the Matter of

Amendment of Section 73.202(b), RM-4611
Table of Allotments,
FM Broadcast Stations.
(Oak Beach and Bay Shore,
New York)

MEMORANDUM OPINION AND ORDER

Adopted: January 19, 1988; Released: February 25, 1988

By the Commission:

1. The Commission has before it the petition for reconsideration[1] filed by Emmis Broadcasting Corporation of New York (Emmis), licensee of FM Station WQHT (formerly WAPP), Lake Success, New York,[2] This petition is directed to the *Memorandum Opinion and Order*, 2 FCC Rcd 1293 (1987), which denied an application for review filed by Doubleday Broadcasting of New York, Inc., former licensee of Station WQHT, of the action allotting Channel 276A to Bay Shore, New York. No other pleadings were received in connection with this matter.

2. We have reviewed the petition for reconsideration and have determined that the arguments advanced by Emmis were previously considered in the earlier *Memorandum Opinion and Order* and Emmis has not submitted any new facts warranting further consideration of this proceeding. Accordingly, pursuant to Section 1.115(g) of the Commission's Rules, the petition for reconsideration will be dismissed.

3. Accordingly, IT IS ORDERED, That the aforementioned petition for reconsideration filed by Emmis Broadcasting Corporation of New York is HEREBY DISMISSED.

4. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster III
Acting Secretary

FOOTNOTES

[1] Public Notice was given on April 16, 1987 (Report No. 1653).

[2] On June 26, 1986, the Commission granted an application to assign the license from Doubleday Broadcasting of New York, Inc. to Emmis (BALH-860430HS).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-397

In the Matter of

KOZN FM STEREO 99, LTD.

Licensee of Radio Station
KOZN-FM, Imperial, California

Order To Show Cause Why The License
Of KOZN-FM, Imperial, California,
Should Not Be Revoked

In re Application of

KOZN FM STEREO 99, LTD.
(Assignor)

and File No. BALH-861106GG

DESERT BROADCASTING
(Assignee)

For Assignment of License of
Station KOZN(FM)
Imperial, California

MEMORANDUM OPINION AND ORDER

Adopted: February 18, 1988; Released: February 25, 1988

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to delegated authority,[1] has before it a "Petition for Special Relief," filed November 6, 1986, and supplemented on December 3, 1986, by KOZN FM Stereo 99, Ltd. (Petitioner), seeking the assignment of license for radio Station KOZN(FM), Imperial, California. Petitioner proposes to sell KOZN(FM) to Desert Broadcasting (Desert) for $200,000 pursuant to the Commission's minority distress sale policy.[2]

2. By *Order to Show Cause and Notice of Apparent Liability*, 51 Fed. Reg. 4236 (1986), the Commission ordered Petitioner to show cause why its license for radio Station KOZN(FM) should not be revoked for alleged unauthorized operation by an alien licensee and for the alleged misrepresentation by the licensee that he was an American citizen. By *Order*, FCC 86M-3335, released November 13, 1986, the Presiding Judge continued without date the scheduled hearing in this proceeding pending action on the Petition for Special Relief.

3. In order to qualify for distress sale relief, a licensee must show that the hearing has not yet commenced, that there is significant minority ownership in the proposed transferee, and that the station will be sold at a maximum of 75 percent of its fair market value as of the date of designation for hearing. *Lee Broadcasting Corp.*, 76 FCC 2d 462 (1980); *Statement of Policy on Minority Ownership of Broadcast Facilities*, 68 FCC 2d 979 (1978); and *Clarification of Distress Sale Policy*, 44 RR 2d 479 (1978). Thus, the buyer and seller must each retain an appraiser and submit an appraisal of the fair market value of the station as of the date on which the license was designated for hearing. If the difference between the two appraisals is more than five percent of the average of the appraisals, the parties must jointly choose and retain a third appraiser. Then, the average of the three appraisals will constitute the station's fair market value. *Grayson Enterprises, Inc.*, 77 FCC 2d 156 (1980), as clarified by *Patrick Henry*, 79 FCC 2d 393 (1980). Finally, the appraisals must contain specific documentation and supporting computations. *Northland Television, Inc.*, 72 FCC 2d 51, 56 (1979), as further clarified in *Grayson*, 77 FCC 2d at 164.

4. The parties have met the threshold criteria for relief by distress sale. First, the hearing has not yet commenced. Second, Petitioner has established that the proposed assignee of KOZN(FM) has significant minority ownership. Specifically, 51 percent of Desert is owned by Jose Gonzalez, Jr., an Hispanic of Cuban/American extraction. Mr. Gonzalez is also a vice president and director of Desert. Finally, the parties' methodology for determination of KOZN(FM)'s fair market value and establishment of the distress sale price comports with the third Commission requirement.

5. With respect to the determination of KOZN(FM)'s fair market value, Petitioner has submitted a station appraisal by William A. Exline. Inc. (Exline), an experienced media appraiser. Exline used several methods of determining the value, including a gross multiplier and cash flow basis. In making its appraisal, Exline relied on financial data provided by Petitioner, property descriptions and equipment inventory, market data from Exline's files, progress and sales income since the station was put on the air, cash flow at the end of the past year, desirability of comparable California stations on the market, and sales of similar properties in California. Desert has submitted an appraisal by Cliff Gill Enterprises, Inc. (Gill), an experienced appraiser. In making its appraisal, Gill relied on financial data provided by Petitioner, property descriptions and equipment inventory, market data from its files, gross billings and cash flow, and sales of similar properties in the market area.

6. The appraisal submitted by Petitioner places the value of Station KOZN(FM) in the range of $340-$360,000. The appraisal submitted by Desert values the station at $375,000. Utilizing the $360,000 and $375,000 figures, the average of the appraisals is $367,500 and the sale price of the station is 54.4 percent of the fair market value. Utilizing the $340,000 and $375,000 figures, the average is $357,500 and the sale price is 55.9 percent of the fair market value. In either case, the sale price is well below the 75 percent maximum permitted by the Commission. Accordingly, the parties have established that KOZN(FM) will be conveyed at a price which comports with the minority distress sale policy. *Grayson*, 77 FCC 2d at 163.[3]

7. As a final matter, the parties have disclosed all the facts and circumstances regarding the distress sale agreement, including the negotiations relating thereto and the consideration to be exchanged. *KND Corp.*, 48 RR 2d 631 (1980). In addition, the assignment application has been

processed and the assignee has been found to be fully qualified to be a Commission licensee. [4] Therefore, the Petition for Special Relief, as supplemented, and the assignment application for Station KOZN(FM) shall be granted, subject to the condition that the contemplated assignment is, in fact, consummated within ninety (90) days of the release date of this *Memorandum Opinion and Order*. If the assignment is not consummated within ninety (90) days, however, this proceeding will return to hearing status and the hearing proceedings will resume in accordance with the *Order to Show Cause and Notice of Apparent Liability*, 51 Fed. Reg. 4236 (1986).

8. Accordingly, IT IS ORDERED that, subject to the condition posed in paragraph 7, above, Petitioner's "Petition for Special Relief," as supplemented, IS GRANTED; the application for assignment of license of Station KOZN(FM) (File No. BALH-861106GG) IS GRANTED; and this proceeding IS TERMINATED.[5]

FEDERAL COMMUNICATIONS COMMISSION

Alex D. Felker
Chief, Mass Media Bureau

FOOTNOTES

[1] *See Faith Center, Inc.*, 54 RR 2d 1286, 1287 n.11 (1983); *Minority Ownership in Broadcasting*, 92 FCC 2d 849, 859 (1982).

[2] *See* discussion at para. 3. On December 17, 1986, the Commission adopted a *Notice of Inquiry* (*MM Docket 86 - 484*), 52 Fed. Reg. 596 (published January 7, 1987), seeking to reexamine certain policies, including the distress sale policy. In its Notice, the Commission ordered the Mass Media Bureau to hold in abeyance all pending distress sale requests. By Order, FCC 87-17, released January 14, 1988, the Commission rescinded this direction and ordered the Bureau to proceed with the processing of distress sale requests in accordance with prior Commission policies and standards.

[3] Ordinarily, where the difference between the appraisals is more than five percent of the average of the appraisals, as it is if the $340,000 and $375,000 figures are used, a third appraisal must be submitted. However, where, as here, the sale price does not even approach the 75 percent maximum set by the Commission, no useful purpose would be served by requiring the parties to go to the additional time and expense of securing a third appraisal.

[4] The assignment application was accepted for filing by Public Notice, No. 021570, released November 19, 1986. No petitions to deny were filed.

[5] Faith Center, Inc., 54 RR 2d 1286, 1287 n.11 (1983); Minority Ownership in Broadcasting, 92 FCC 2d 849, 859 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 83-657
And 84-835

In re Applications of

THE SEVEN HILLS TELEVISION COMPANY

For Renewal of License of KTVW-TV Phoenix, Arizona, *et al.* — File Nos. BRCT-830601KJ and BPTT-840308IQ

MEMORANDUM OPINION AND ORDER

Adopted: February 17, 1988; Released: February 25, 1988

By the Review Board:

1. The Review Board has under consideration a petition filed December 14, 1987 by the Seven Hills Television Company ("Seven Hills") requesting partial reconsideration of our decision in *Seven Hills Television Company*, 2 FCC Rcd 6867 (Rev. Bd. 1987) ("*Decision* "), *erratum*, 2 FCC Rcd 7099. [1] Therein, we granted Seven Hills' license renewal application for KTVW-TV, Phoenix, Arizona, subject to several conditions limiting the principals and employees of Seven Hills from engaging in certain specified business and financial relationships with foreign interests with whom those principals had strong institutional ties of very long duration. The petition for partial reconsideration urges the removal of the conditions imposed upon the licensee's principals and employees, and attacks the Commission's authority to order the reformation of certain covenants not to compete. The Mass Media Bureau opposes the petition for partial reconsideration.

2. *Covenants Between Seven Hills Principals and SIN, Inc. (Univision).* In reviewing the personal, corporate, and financial tethers that had closely bound the principals of Seven Hills to those entities owned and/or controlled by the Azcarraga interests of Mexico, [2] the Board was very belatedly supplied with copies of certain May 1986 contracts between Seven Hills principals Rene Anselmo and William Stiles and one of their former entities, SIN, Inc. (now Univision). [3] Described in greater detail in our *Decision*, these undisclosed 1986 instruments, in the main, provided that Anselmo, at $500,000 per year for 2 1/2 years, and Stiles, at $25,000 per month for 15 months, would remain as consultants to SIN, Inc. And, further, that for the duration of the said period these two Seven Hills principals:

> shall not become employed by or provide services or consultation to any organization which is in the Spanish-language television network or Spanish-language pay television distribution business in the continental United States.

Decision at para. 75. Noticing the nationwide dominance over domestic Spanish-language television broadcasting enjoyed by Univision (and its predecessor, SIN, Inc.), [4] and recognizing the unique historical overlap between the principals of Seven Hills (most particularly Anselmo) and the Azcarraga interests of Mexico which led to encroachments upon the general federal policy embodied in 47 U.S.C. §310(b), the Board specifically conditioned the Seven Hills license renewal for KTVW-TV upon a reformation of those "*entre nous* " arrangements so as to bring them into full accord with the Commission's staunchly pro-competitive policies, especially the Commission's longstanding wariness of covenants not to compete amongst broadcasting concerns. *See Decision*, para. 76 (and illustrative cases cited therein).

3. Seven Hills challenges this renewal condition, first by claiming that the subject covenants not to compete were not a component part of the overall settlement of the consolidated license renewal cases involving Spanish International Communications Corp., Bahia de San Francisco Television Co., and Seven Hills. Thus, although Seven Hills president, Rene Anselmo, had always held the position of president of both of those former licensee corporations, and was a substantial equity owner in all three companies (and their network SIN, Inc.) prior to the comprehensive May 1986 Settlement Agreement, *see Decision*, paras. 12-15, Seven Hills here maintains that "[t]he SICC Settlement Agreement was unrelated to the disengagement of Anselmo and Stiles from SIN." [5] In other words, Seven Hills would have the Board blindly presume that - after an intimate interlocking relationship of more than 30 years duration - Anselmo's May 1986 "resignation" as president of SIN, Inc., accompanied by his contemporaneous disposal of his 25% equity interest in SIN, Inc., was simply at temporal coincidence with the larger SICC Settlement Agreement, and not a homologous component of that larger Settlement Agreement requiring specific FCC review and approval.

4. We reject Seven Hills' claim of "no relationship" between the Anselmo and Stiles "resignations" from SIN, Inc. (and the attendant covenants not to compete) and the contemporaneous SICC Settlement Agreement approved by the Board and the Commission in resolution of the severed license renewal proceedings. We again find that the decision of the two subject licensee corporations (of which Anselmo was simultaneously president) to sell all of their domestic broadcast stations in settlement of the Commission's license renewal proceedings and the concurrent "resignations" of Anselmo and Stiles from SIN, Inc., were most obviously - in Seven Hills' own words - "part of a *series of agreements* which brought about the total separation of Anselmo and Stiles from the SIN *network.*" [6] That is precisely what the Board determined when it stated that the subject covenants not to compete were "part and parcel of the comprehensive SICC settlement." *Decision* at para. 75. Accordingly, insofar as the undisclosed covenants had a direct and immediate bearing upon the question of the extant, and future, relationships between the Azcarraga-controlled SIN, Inc. and all three licensee corporations and/or their principals, full and timely disclosure of those covenants was to be expected. While it is accepted that the two settling licensee corporations did make passing reference to the existence of these vestigial 1986 covenants between Anselmo, Stiles and SIN, Inc., *see supra* note 3, the actual terms of those covenants were not revealed to the Commission until after oral argument

before the Board on the residual Seven Hills license renewal - more than 14 months later. Neither Seven Hills (nor Anselmo nor Stiles) volunteered those pertinent covenants in the ongoing license renewal proceeding involving those two principal parties.

5. Because we found the terms and conditions of the Anselmo and Stiles covenants to have been an undisclosed aspect of the comprehensive SICC Settlement Agreement approved by the Board without full knowledge, we were necessarily constrained to consider *post hoc* whether these two settlement-related covenants were consistent with Commission policy. We found that they were not, and ordered an appropriate reformation in accordance with established Commission practice. *See Decision*, para. 76 (citing *Intercontinental Radio, Inc.*, 62 RR 2d 1565, 1567-1568 (1985)). Seven Hills here contends that the Commission has "no authority to retrospectively interfere with private contracts absent substantial licensing consider-ations." [7] It also claims: "The covenants not to compete have little or nothing to do with the basic qualifications of Seven Hills to be a Commission licensee and impose no burdens on the public." [8]

6. But, having found in the underlying hearing record *exactly* the "substantial licensing considerations" claimed by Seven Hills to be requisite to a Commission order to modify any offending private agreements, *see, e.g., Decision*, paras. 69-70, we can readily dispose of its threshold argument. Next, and as to its assertion that these blatantly anticompetitive agreements, particularly in a highly specialized television market so thoroughly dominated by a single broadcast entity, [9] "impose no burdens on the public," we all but demur; this conclusory declaration is, on its face, unworthy of prolonged response. [10] We can imagine no public interest reason whatever for the United States government to officially approve a broad nationwide agreement not to compete between Messrs. Anselmo and Stiles, perhaps the two most experienced Spanish-language television programming executives in the country, and SIN, Inc. (Univision), which continues to dominate the national market in such specialized programming. *See supra* note 4. Again, had we been fully apprised of the actual terms and conditions of these two covenants not to compete at the time the 1986 Settlement Agreement was presented to us for approval, we would have required the identical reformation of those covenants, in conformance with established Commission policy, as an absolute prerequisite to our acquiescence in that settlement. For we are certain that these sharply anticompetitive "side agreements" between Anselmo, Stiles and SIN, Inc. would not have received this Commission's official public grace. These days especially, competition is the keystone of our structural regulatory policy. *See, e.g., Character Policy Statement*, 102 FCC 2d 1179, 1201 (1986)(emphasis added; footnotes omitted), where the Commission "note[d] that concerns with *anticompetitive* and antitrust activity in broadcasting have occupied a *unique* position in the Commission's regulatory scheme" and that "[t]hese concerns have been expressed not only in specific rules, but also as elements in those areas involving *discretionary* determinations by the Commission." And, to the extent that Seven Hills here submits that the continuation of any substantial linkage between Seven Hills principals and Azcarraga-controlled broadcast interests "have little or nothing to do with" Seven Hills "basic qualifications," we simply direct its attention, once more with emphasis, to the questionable conditions giving rise to the Section 310(b) issue designated against it in the first instance, to the findings and conclusions of Judge Conlin's *Initial Decision*, and to our own *Decision*, paras. 68-69.

7. *Other License Renewal Conditions.* Seven Hills generally opposes all of the conditions imposed on its license renewal for KTVW-TV on its theory that the Board found no past violation(s) of 47 U.S.C. §310(b)(3); and that, therefore, our license renewal conditions requiring a less permeable barrier between Seven Hills principals and the Azcarraga interests of Mexico, both now and in the forthcoming license renewal term, are unjustified. It points to the 1986 Settlement Agreement, by virtue of which Anselmo became divested of his ownership interests and corporate offices in the Spanish International and Bahia licensees, as well of his equity interest and presidency of SIN, Inc., and it argues that these divestitures are sufficient by themselves to ensure against any potential violation of Section 310(b)(3).

8. The sustaining premise upon which Seven Hills bases its argument that no special licensing conditions are justified by the record in this case is not completely correct. That premise - that our "Decision does not uphold the ALJ's adverse conclusion of *de facto* alien control" [11] - both overstates and understates the Board's enlarged analysis of the extensive record in this case. Initially, we must reiterate that our essential determination that the Mass Media Bureau had not proved, by a preponderance of the record evidence, specific violations of Section 310(b)(3) was, in turn, entirely a function of the Board's appellate view that the ALJ's placement of the burden of proof upon the licensee(s) in the unusual circumstances there present was inconsistent with the "concepts of basic fairness" articulated recently by the Commission in *Calhoun County Broadcasting Co.*, 57 RR 2d 641 (1985). [12] In so deciding, we rejected the Mass Media Bureau's contention that the evidentiary burden of proof was properly placed upon the licensees, because - in the Bureau's formulation - the Section 310 issue turned upon knowledge "peculiarly within the possession" of the licensee(s). *See Decision*, para. 24. We there reflected that the allegations of a violation of Section 310(b)(3) were first raised here by a complaining petitioner, in exactly the same manner as in a formal petition to deny. Under the Communications Act, the burden of proof is routinely placed upon such a complaining petitioner by the Commission. *See* 47 U.S.C. §309(e); *see also Calhoun County.* [13] And, second, while the Mass Media Bureau insisted that any knowledge of a violation of Section 310(b)(3) was a matter "peculiarly within the possession of the licensee," we note: (1) that the *Hearing Designation Order* [14] in this case explained that the proceeding ordered therein was, at least in part, the result of a 2-year investigation of the facts by that same Mass Media Bureau; and (2) that the *Hearing Designation Order* specifically placed upon the Mass Media Bureau - *not the licensee* - the burden of proceeding with the introduction of evidence on the Section 310(b)(3) issue. [15] This latter burden placement plainly contravenes the Bureau's contention that *the licensee* possessed a disproportionate grasp of the body of relevant evidence. In light of the foregoing, as well as the Commission's rationale in *Calhoun County*, our *Decision* held that the exceptions to the ALJ's refusal to reallocate the burden of proof were well taken. And, accordingly, the Board reviewed the record evidence from the standpoint of a burden of proof on those antagonistic to license renewal. [16]

9. At the same time, the Board recognized that the Commission has not had occasion to further enucleate *Calhoun County* on the burden of proof question, and that, therefore, the Board's construction in this case might be open to possible question. Hence, the Board took the unorthodox and additional step of considering the same hearing record as if it had *not* found error in the ALJ's refusal to reallocate the burden of proof in the wake of the Commission's issuance of *Calhoun County*. *See Decision*, paras. 63-66. In that contingency, we found not disagreeable the ALJ's general conclusion that the licensee(s) had not shown on the record to be free of foreign influence in excess of that permitted under Section 310(b)(3), and that Anselmo did act, at least upon occasion, as an agent for those foreign interests in his dual role as president of the licensee corporation(s) and as president of SIN, Inc. *See, e.g., id.*, para. 64. Though we did not, in any event, find any past statutory violation of sufficient gravity to warrant the drastic sanction of a denial of Seven Hills' license renewal application, *see id.*, para. 67, we left absolutely no doubt of our view that unless appropriate measures were taken to separate the domestic and foreign interests historically fused through the complex grid of joint ownership and management arrangements, we could never warrant the sanctity of Section 310(b)(3). Or, in consequence, to renew the license of Seven Hills. Substantial and material questions would unavoidably attach to the continuation or extension of the prior Anselmo-Azcarraga axis. *See id.*, paras. 65, 68. Nothing contained in Seven Hills' instant petition justifies a reconsideration of that essential view, a view shared by both the ALJ and the Mass Media Bureau.

10. The only legitimate question raised by the instant petition is whether any of the conditions attached to the Seven Hills license renewal are overbroad and/or unnecessary to assure future compliance with Section 310(b)(3). We have already addressed *supra* the two covenants not to compete; and, continuing to find them unacceptable, we must reaffirm that condition. We next consider Seven Hills' claim that its network affiliation contract with SIN, Inc. (Univision) does not portend a violation of Section 310(b)(3) or otherwise violate the Commission's network affiliation rules. It here submits a copy of its latest such agreement and asserts that it is identical to all other current Univision/licensee affiliation agreements. Conversely, the Mass Media Bureau supports the Board's prior analysis of that affiliation agreement, [17] and urges that a reformation of that agreement is necessary "to ensure that excessive foreign control of the licensee is no longer the result of a sharing of revenues between the licensee and a foreign corporation." [18] In view of fact that the revised affiliation agreement between Seven Hills and Univision is, in fact, identical to those of all Univision affiliates, and does not appear to conflict with pertinent Commission rules or policies, we will not impose further restrictions on the licensee. This particular facet of the licensee's relationship with SIN, Inc. was never more than a minor concern in the entire range of attending circumstances. Here, the matter of future compliance with subsections 73.658(h) and (i) of the rules was, and remains, our chief concern. So long as Seven Hills complies with all of the various provisions of Section 73.658, the Board will go no further in that regard. Should the Mass Media Bureau continue to find problems with the current Seven Hills/Univision network affiliation agreement, it can always take the matter up directly with the licensee at any time, and move to enforce compliance with the Commission's rules and policies in this area.

11. Finally, Seven Hills asserts that the conditions we have imposed "interfere with Rene Anselmo's freedom to enter into a wide array of foreign operating and landing agreements needed to operate PanAmSat -- a venture involving Commission approval to build and launch a separate satellite system providing international satellite communications." [19] The Board has reviewed its original conditions in the face of this assertion, and finds that Condition (2) - if read distantly out of context and in some manner not explained very clearly by Seven Hills' conclusory assertion - might tangentially touch upon Anselmo's plans for PanAmSat. [20] The Board had no such extraneous intention, its focus being exclusively upon Seven Hills' future broadcast operations. Nevertheless, we will modify Condition (2) by adding the following sentence:

> "Nothing contained herein shall encompass the contracts and agreements entered into between Seven Hills principals and foreign telecommunications entities which relate to the provision of common carrier satellite services."

However, any such contracts or agreements must naturally be in compliance with 47 U.S.C. §310.

12. Having fully considered Seven Hills' petition for reconsideration, and with the modifications set forth above, the Board considers its role in this proceeding at an end. Most of the concerns the Commission had expressed at the initiation of this proceeding have been fully satisfied, we believe, by the subsequent divestitures and corporate realignments discussed by the Commission in its prior settlement oversight. [21] With the conditions imposed on the license renewal of Seven Hills (as slightly modified above), we further believe that a grant will serve the public interest. Should the licensee still find fault with our disposition, full Commission review is, as always, the licensee's undeniable entitlement.

13. ACCORDINGLY, IT IS ORDERED, That the petition for partial reconsideration filed December 14, 1987 by the Seven Hills Television Company IS DENIED, and the Board's *Decision*, 2 FCC Rcd 6867 IS MODIFIED to the extent indicated herein; and

14. IT IS FURTHER ORDERED, That the motion to strike letter pleading, filed December 18, 1987 by the Mass Media Bureau IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] The larger part of the original proceeding involving also Spanish International Communications Corporation and Bahia de San Francisco Television Company was settled prior to review of the initial decision. *See* 1 FCC Rcd 92 (Rev. Bd. 1986), *recon. denied*, 1 FCC Rcd 844 (Rev. Bd. 1986), *erratum*, 1 FCC Rcd 1036, *aff'd,2 FCC Rcd 3336 (1987) (judicial appeals pending). A*

simultaneously filed joint petition for partial reconsideration of our Seven Hills Decision was dismissed as procedurally defective by *Memorandum Opinion and Order*, FCC 88R-8, *FCC Rcd* .

[2] It has been suggested (Seven Hills Reply at 9 & n. 25) that SIN, Inc., now known as Univision, may be sold to the domestic entity (Hallmark Cards, Inc.) that has recently purchased the broadcast stations of Spanish International Communications Corp. and Bahia de San Francisco Television Co., *see Spanish International Communications Corp.*, 2 FCC Rcd 3962 (1987) (per Mass Media Bureau)(application for Comm'n review pending). However, insofar as the Board is aware, Univision remains owned and controlled by the same foreign interests that controlled SIN, Inc. *See Decision*, 2 FCC Rcd at 6870.

[3] Seven Hills' reconsideration request denied any failure on its part to advise the Commission of the subject covenants in violation of Section 1.65 of the Commission's Rules, 47 CFR §1.65. Its petition points out that, in a Petition for Leave to File Information Statement, tendered by SIN, Inc. on May 26, 1986 (and in a companion Motion to Reopen the Record filed by Spanish International Communications Corp./Bahia de San Francisco Television Co. filed on May 30, 1986), the Board was apprised:

> While Mr. Anselmo is no longer an employee of SIN, he has a consultancy agreement with the company to assist with the transition to new management.
>
> Mr. Stiles has a similar consultancy agreement.

Seven Hills Petition at 7 (footnotes omitted)(quoting May 30, 1986 Bahia Motion). Our *Decision*, however, did acknowledge that the Commission had been so alerted to the existence of some continuing ties between those two Seven Hills principals and SIN, Inc. (Univision); and it was expressly for that reason that no further action was deemed warranted under Section 1.65. *Id.*, para. 74. Nevertheless, Seven Hills cannot take complete refuge in the filings of the two severed parties, particularly since (1) it is not clear that Anselmo was even associated with the filing parties at the time the two aforecited motions were filed; and (2) Seven Hills, as the sole remaining licensee in this proceeding, had an independent and continuing duty under Section 1.65 to fully and forthrightly advise the Commission of the nature and extent of its continuing corporate and financial links to SIN, Inc. and/or the Azcarragas. Those historic links, after all, were the "hot button" that launched this entire license renewal proceeding, and the precise terms and conditions of any post-partum agreements were clearly relevant to the *future* qualifications of Seven Hills. Our prior views on this matter, though admittedly non-decisional, will not be altered. The underlying facts are not in dispute and the rule violation, however guileless, is manifest.

[4] For example, it was recently reported that "Univision ... operates 24 hours daily and has a line-up of 463 satellite-interconnected stations," while its closest competitor, Telemundo, "consists of five-owned stations plus several affiliates." Sobel, *Where's Spanish TV Going?*, TELEVISION/RADIO AGE, Nov. 23, 1987, at A-27.

[5] Seven Hills Petition at ii.

[6] *Id.* (emphases added).

[7] *Id.*, at 11.

[8] *Id.*, at 12.

[9] *See supra* note 4.

[10] We shall rely, as before, on our previous discussion, *see Decision*, at para. 76.

[11] Seven Hills Petition at 17.

[12] *See Decision*, paras. 23-24.

[13] We recognize that the complaining petition that ultimately triggered this case had been treated administratively as merely an "informal complaint," *see* 47 CFR §1.41, quite probably because the complaining petitioner had not sufficiently met the much higher threshold standards for lodging a formal petition to deny. *See* 47 U.S.C. §309(d). The Board believes that neither Congress nor the Commission intended to establish a scheme whereby a complainant not even meeting the statutory standards for acquiring the status of a "petitioner to deny" under Section 309(d) could succeed in having the critical evidentiary burdens placed upon the licensee, whereas another complainant actually meeting the stringent statutory standards of Section 309(d) would itself bear the evidentiary burden instead. Such a dynamic would create an obvious incentive for a complaintant *not* to meet the higher standards of Section 309(d), and thus construct a legal *non sequitur* nowhere suggested in the statutory renewal scheme. And, as we pointed out in our *Decision*, the complainant here was, in fact, accorded the very party status statutorily reserved for complainants qualifying adequately under Section 309(d).

[14] 48 Fed. Reg. 28594, published June 22, 1983.

[15] *Id.* In view of the fact that the *Hearing Designation Order* specifically placed the burden of proceeding with the evidence on the Mass Media Bureau, rather than on the licensee, it is plain that the Commission recognized that the imposition of all evidentiary burdens on the licensee, as mandated by the statute in the absence of a complainant or a competitor, was neither required nor appropriate in the ambiguous situation obtaining here. *Compare* Section 309(e).

[16] The Board fully recognizes that a post-hearing "reallocation" of the burden of proof is both legally awkward and highly unusual. But, not unprecedented. *See D & E Broadcasting Co.*, 1 FCC 2d 78 (1965), where the Commission - long after the conclusion of the hearing - reversed the Board's allocation of the burden of proof on issues centering on alleged statutory violations, thereby relieving that applicant of the Board's adverse findings. Although the Mass Media Bureau is participating in this reconsideration phase of our *Decision*, and is fully aware of our decisional determinations respecting the burden of proof allocation, it does not seek reconsideration of our action in that regard. Nor, it follows of course, does the Bureau now suggest that it would have tried the case differently had it (and not the licensee(s)) borne the burden of proof below. In fact, considering that the Bureau has throughout borne the burden of proceeding with the evidence in this case, any such claim of prejudice by our constructive reallocation would have a rather odd resonance.

[17] *See Decision*, para. 71.

[18] Mass Media Bureau Opposition at 4-5.

[19] Seven Hills Petition at 20.

[20] Condition (2), as set forth in our *Decision*, provides:

> 2. No principal or employee of Seven Hills shall have any contract or agreement with any member of the Azcarraga family, or its agents or representatives, or any entity where the equity interests of any such person(s) exceeds 20%, irrespective of the subject matter of such contract, without first reducing that contract to writing and acquiring the prior approval of the Chief of the Mass Media Bureau.

[21] *See Spanish International Communications Corp.*, 2 FCC Rcd 3336 (1987).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-399

In re Applications of

NEWTON TELEVISION LIMITED	File No. BPCT-850827KJ
NEWTON TELEVISION, INC.	File No. BPCT-850828KK
FAMILY STATIONS, INC.	File No. BPCT-850828KL
VANGUARD BROADCASTING	File No. BPCT-850828KU
PRESS BROADCASTING COMPANY	File No. BPCT-850828KV
NEWTON BROADCASTING COMPANY, LTD.	File No. BPCT-850828KY
MOUNTAIN BROADCASTING CORPORATION	File No. BPCT-850828LA

For Construction Permit for a
New Television Station
Newton, New Jersey

ERRATUM

Released: Febraury 25, 1988

The *Decision*, FCC 88R-4, released February 5, 1988 contains severe computer garbling and is, therefore, corrected as follows:

Paragraph 8, line 32, change "*Se* e" to "*See* "

Paragraph 10, line 16, change "whollyirrelevant" to "wholly irrelevant"

Paragraph 19, is corrected to read:

19. IT IS FURTHER ORDERED, That the application of Mountain Broadcasting Corporation (File No. BPCT-850828LA) for a construction permit for a new television station at Newton, New Jersey IS GRANTED subject to the condition that its operation with an effective radiated power of 5000 kW is approved by the government of Canada; the application of Family Stations, Inc. (File No. BPCT-850828KL) IS DISMISSED; and the applications of Newton Television Limited (File No. BPCT-850827KJ), Newton Television, Inc. (File No. BPCT-850828KK), Vanguard Broadcasting (File No. BPCT-850828KU), Press Broadcasting Company (File No. BPCT-850828KV), and Newton Broadcasting Company, Ltd. (File No. BPCT-850828KY) ARE DENIED.

Footnote 2, 2nd column, 4th full paragraph:

lines 1-4, which begin with "The Fletchers apparently received" and end with "promising the latter two a limited", should be in italics, except for the word "ab initio"

lines 5-6, should be in italics

line 7, should read "*Fletchers*. Tr. 408. The Fletchers accepted Telarc's specific"

lines 8-9, should not be in italics.

Footnote 2, 2nd column, 6th full paragraph:

lines 1-2, which begin with "Telarc also seemed", should be in italics, except for the last word, "This", on line 2

line 3, should not be in italics

line 4, "partnership's expenses out of pocket." should not be in italics

Footnote 7, lines 21-25, move the words beginning with "Newton Broadcasting" down two lines and left justified with line 4

Footnote 8, line 5, change "communityor" to "community or"

Footnote 15, line 15, move the words beginning with "charming, are not" to line 14 immediately following "while"

Footnote 25, line 3, change "ACrues" to "accrues".

BY DIRECTION OF THE REVIEW BOARD

Allan Sacks
Chief for Law

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-44

In the Matter of

Amendment of Section 73.606(b), RM-6083
Table of Allotments,
Television Broadcast Stations.
(Goldfield, Nevada)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 14, 1988; Released: February 24, 1988

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Sarkes Tarzian, Inc. (petitioner), licensee of Station KTVN, Channel 2, Reno, Nevada, requesting the substitution of VHF Channel 7- for unoccupied and unapplied for Channel 2 at Goldfield, Nevada.[1] Petitioner states that it has a pending application proposing to relocate Station KTVN's transmitter from Red Peak to McClellan Peak (BPCT-860507KG) which is short-spaced by 28.8 kilometers to the Channel 2 reference point at Goldfield.[2] Petitioner claims that by moving its transmitter to McClellan Peak, Station KTVN would be able to improve its off the air service to Carson City, Nevada, and other areas. It argues that the likelihood of a grant of its pending application will be enhanced if the need for a short spacing waiver to the Goldfield allotment is eliminated.

2. We believe the public interest would be served by seeking comments on the substitution of Channel 7- for Channel 2 at Goldfield, Nevada, since it may enable Station KTVN to relocate its transmitter to its desired McClellan Peak and thus increase service to areas surounding Reno. Channel 7- can be allocated to Goldfield in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[3] Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed

	Channel No.	
City	Present	Proposed
Goldfield, Nevada	2-	7-

3. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

4. Interested parties may file comments on or before **April 18, 1988,** and reply comments on or before **May 3, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert B. Jacobi, Esq.
Cohn & Marks
1333 New Hampshire Avenue, N.W.
Washington, D.C. 210036
(Counsel to petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTES

[1] Petitioner states that an application for a construction permit for Channel 2 at Goldfield was filed by Courtney Jackson on December 23, 1986. Petitioner submits that it has filed a petition to dismiss Jackson's application since it proposes a site which is 4 kilometers short-spaced to Station KTVN's present transmitter site and was not accompanied by a waiver request. Jackson's application was dismissed by the Commission on February 24, 1987, and there are no other applications on file.

[2] Petitioner states that its application is also short-spaced to TV Station KTVU, Channel 2, Oakland, California. This short-spacing is more properly addressed in connection with petitioner's pending application and thus will not be considered herein.

[3] The coordinates for this allotment are: North Latitude 37o, 42', 24"; West Longitude 117o, 14', 06".

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-43

In the Matter of

Amendment of Section 73.202(b), RM-6119
Table of Allotments,
FM Broadcast Stations.
(La Grande, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 14, 1988; Released: February 24, 1988

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the petition for rule making filed by Grande Radio, Inc. (petitioner), requesting the substitution of Channel 254C2 for Channel 252A at La Grande, Oregon, and the modification of its license for Station KKUC(FM) to specify the higher powered channel. Petitioner submits that the substitution of channels will serve the public interest because the region will benefit from the resulting expanded radio service. Petitioner states that it will promptly modify its licensed facilities if the requested substitution of channels is granted.

2. Channel 254C2 can be allocated to La Grande in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. We note that petitioner's site 12.5 kilometers (7.8 miles) north also complies with the spacing requirements.[1] transmitter site. As requested, we shall also propose to modify the license of Station KKUC(FM) to specify Channel 254C2. In accordance with the procedures governing adjacent channel upgrades set forth in Section 1.420(g) of the Rules, the Commission will not accept competing expressions of interest in use of the higher powered channel at La Grande nor require the petitioner to demonstrate the availability of an additional equivalent channel for use by other interested parties.

3. We believe the public interest would be served by proposing the substitution of Channel 254C2 for Channel 252A at La Grande, Oregon. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
La Grande, Oregon	252A, 261A	254C2, 261A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 18, 1988,** and reply comments on or before **May 3, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert G. Allen, Esq.
McCabe & Allen
8803 Sudley Road
P.O. Box 2126
Manassas, Virginia 22110
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are: North Latitude 45o, 26', 15"; West Longitude 118o, 05', 27".

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-42

In the Matter of

Amendment of Section 73.606(b), RM-6139
Table of Allotments,
Television Broadcast Stations.
(Coos Bay, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 14, 1988; Released: February 24, 1988

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the petition for rule making filed by KMTR, Inc. (petitioner), requesting the allocation of Channel 23 to Coos Bay, Oregon, as the community's first local television allotment. Petitioner states that it will apply for a construction permit to build a facility on Channel 23 and operate the station as a satellite of its Station KMTR-TV in Eugene, Oregon.

2. On July 16, 1987, the Commission instituted a temporary freeze on the filing of petitions for rule making to amend the TV Table of Allotments for certain metropolitan areas, including those communities located within the minimum co-channel separation distance. *See Order, Advanced Television Systems and Their Impact on the Existing Television Broadcast Service*, 52 Fed. Reg. 28346, published July 29, 1987. Our review of petitioner's proposal shows that Channel 23 can be allocated to Coos Bay in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction. However, Coos Bay is one of the communities affected by the freeze *Order* since it is located within 175 miles (the co-channel minimum distance separation) of Portland, Oregon, which is one of the areas affected by the freeze. On further analysis, we find that Channel 23 can be proposed for allotment to Coos Bay in compliance with the terms of the freze *Order* if the transmitter site is restricted to an area 13.3 kilometers (8.3 miles) south.[1] Therefore, we request that petitioner states its willingness to specify a site which would not conflict with the freeze on new allotments within the proscribed area surrounding Portland.

3. We believe that the public interest would be served by proposing the allotment of Channel 23 to Coos Bay as the community's first local television service. Accordingly, we seek comments on the proposed amendment of the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Coos Bay, Oregon	--	23+

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 18, 1988,** and reply comments on or before **May 3, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John Crigler, Esq.
Haley, Bader & Potts
2000 M Street, N.W., Suite 600
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are: North Latitude 43o, 15', 09"; 124o, 15', 52" West Longitude.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-41

In the Matter of

Amendment of Section 73.202(b), RM-6144
Table of Allotments,
FM Broadcast Stations.
(McArthur, Ohio)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 14, 1988; Released: February 24, 1988

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Hometown Broadcasting of McArthur, Inc. (petitioner), requesting the allocation of Channel 254A to McArthur, Ohio, as the community's first local FM allotment. Petitioner states that it will apply for the channel, if allocated.

2. Channel 254A can be allocated to McArthur in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence in the allotment is required since McArthur is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allocation of Channel 254A to McArthur, Ohio, since it could provide the community with its first local FM service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments. Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
McArthur, Ohio	--	254A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **April 18, 1988,** and reply comments on or before **May 3, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John H. Midlen, Jr.
John H. Midlen, Jr., Chartered
1050 Wisconsin Avenue, N.W.
Washington, D.C. 20007-3633
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for this allotment are: North Latitude 39o, 14', 42"; West Longitude 82o, 28', 48".

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-40

In the Matter of

Amendment of Section 73.202(b), RM-6035
Table of Allotments,
FM Broadcast Stations.
(Jacksonville, North Carolina)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 14, 1988; Released: February 24, 1988

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the petition for rule making filed by Marine Broadcasting Corporation (petitioner), licensee of Station WXQR, Channel 288A, Jacksonville, North Carolina. Petitioner requests the allotment of Channel 262C1 at Jacksonville, and the modification of its license for Channel 288A to specify Channel 222C2, which was allocated in MM Docket 84-231.[1] Petitioner states that the Commission has found that allowing existing stations to upgrade their operations is an efficient use of the spectrum and is in the public interest because of the greater population which benefits from the increased signal coverage, citing *Modification of FM and TV Station Station Licenses*, 56 RR 2d 1253 (1984).

2. Section 1.420(g) of the Commission's Rules provides that station's license cannot be modified in rule making to a higher class non- adjacent channel unless there is available an additional channel which is at least equivalent to the one sought by the petitioner. In this case, our review of petitioner's request shows that there are no channels which can be allocated as a Class C2 but that Channel 262 can be allocated as a Class C1. Therefore, we believe that petitioner has requested the modification of its license to the lower powered Channel 222C2 in order to comply with the requirements of the Commission's rules. We note that the modification of Station WQXR's license to either channel would require it to relocate its transmitter.

3. We believe that petitioner's proposal merits consideration since the allocation of Channel 262C1 could provide Jacksonville with its third wide coverage area FM service. As requested, we shall also propose to modify petitioner's license to specify operation on Channel 222C2. Section 1.420(g) of the Commission's Rules specifies that a station's license may be modified to a non-adjacent higher class channel in rule making where it can be shown that there is an additional channel which is at least equivalent to that sought by the petitioner for use by other interested parties. We believe that the requirements of Section 1.420(g) will have been met by the proposed allocation of Channel 262C1 even though it may not be available for application at the same time that petitioner's license is modified. *See e. g., Sedona, Arizona*, 52 Fed. Reg. 12214, published April 15, 1987.[2]

4. Channel 262C1 can be allocated to Jacksonville in compliance with the Commission's minimum distance separation requirements with a site restriction of 42.3 kilometers (26.3 miles) east to avoid a short-spacing to Station WOJY, Channel 262, High Point, North Carolina; to the licensed site of Station WVBS-FM, Channel 260C1, Burgaw, North Carolina, as well as the site specified in its application requesting minimum Class C facilities (BPH-870302NY); [3] and to the proposed allocation of Channel 261C2 to Edenton, North Carolina (2 FCC Rcd 4739 (1987)). In addition, the use of Channel 262C1 at Jacksonville is short-spaced to Station WTEB, Channel 208C1, at New Bern, North Carolina. However, this station has been granted a construction permit specifying operation on adjacent Channel 207C1.

5. We believe the public interest would be served by proposing the allocation of Channel 262C1 at Jacksonville, North Carolina, and the modification of Station WXQR's license to specify Channel 222C2. Grant of the petitioner's proposal could result in the allocation of a higher class of channel than that possible in the original Docket 84-231 proceeding. It would also enable the modification of Station WXQR's license to specify a higher powered channel, thus providing expanded FM service to Jacksonville and its environs. Although petitioner did not request the deletion of Channel 288A from Jacksonville, we shall propose to do so unless an expression of interest in use of the channel is forthcoming in comments. Further, if Channel 262C1 is allocated to Jacksonville, the community would retain its numerical sequence of No. 58 and applications would be accepted for the new channel at the time that window is opened, contingent upon the licensing of Station WTEB on Channel 207C1 at New Bern. Should Station WTEB not be licensed by the time the window is opened, applications for Channel 262C1 at Jacksonville may be delayed until Station WTEB has been granted a license reflecting operation on Channel 207C1. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Jacksonville, North Carolina	222C2, 254C2, 288A	222C2, 254C2, 262C1

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **April 18, 1988,** and reply comments on or before **May 3, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Ronald D. Maines
Gordon & Healy, Chartered
1821 Jefferson Place, NW
Washington, D.C. 20036
(Counsel to petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTES

[1] *See* Fourth Report and Order, 101 FCC 2d 638 (1986).

[2] In response to the Docket 84-231 Further Notice, 50 Fed. Reg. 2835, published January 22, 1985, several parties expressed an interest in the allotment of a Class C1 channel at Jacksonville. *See* , also, Fourth Report and Order, supra. Therefore, in light of the Commission's policy to allocate the highest class of channel available to a community for which an interest has been expressed, we find that the proscription against the substitution of Docket 84-231 channels absent a showing of compelling need or Commission error is not applicable. *See* , Memorandum Opinion and Order, 50 FR 47391, published November 18, 1985, and Post, Texas, 2 FCC Rcd 458 (1986).

[3] The site specified by Station WVBS-FM is within the 16 kilometer buffer zone provided to Class C stations which were operating below Class C minimum facilities.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-39

In the Matter of

Amendment of Section 73.202(b), RM-6151
Table of Allotments,
FM Broadcast Stations.
(Okmulgee and Stillwater, Oklahoma)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 14, 1988; Released: February 24, 1988

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making jointly filed by Brewer Communications, Inc., licensee of Station KOKL-FM, Channel 232A, Okmulgee, Oklahoma, and Stillwater Publishing Company, Inc., licensee of Station KSPI-FM, Channel 230C, Stillwater, Oklahoma (petitioners). Petitioners seek the substitution of Channel 231C2 for Channel 232A at Okmulgee and the modification of Station KOKL-FM's license to specify the higher powered channel. In addition, they request the substitution of Channel 229C2 for Channel 230C at Stillwater and the modification of Station KSPI-FM's construction permit to specify the lower powered channel.[1] Both parties state an intention to apply for the new facilities, if allocated.

2. The Commission's Rules require a 241 kilometer (150 mile) separation between first adjacent Class C and C1 allotments and 130 kilometers (81 miles) between first adjacent Class C2 allotments. However, the two stations are only located approximately 101 kilometers apart. Therefore, Station KOKL-FM at Okmulgee cannot upgrade to Class C2 status unless Station KSPI-FM at Stillwater changes both its channel and class of operation. Petitioners state that the mileage separation requirements will be met if Station KSPI-FM operates on Channel 229C2 at the site specified in its construction permit and Station KOKL-FM relocates its transmitter to the site of Station KQMJ-FM at Henryetta-Tulsa, Oklahoma, which has agreed to lease space to the Okmulgee station.

3. We believe the public interest would be served by proposing the channel substitutions described above since it could permit Station KOKL-FM to improve its service to Okmulgee and the surrounding area and the licensee of Station KPSI-FM at Stillwater agrees to become a Class C2 station. Channel 231C2 can be allocated to Okmulgee in compliance with the Commission's minimum distance separation requirements with a site restriction of 27.5 kilometers (17.1 miles northwest) to accommodate its desired transmitter site. Channel 229C2 can be allocated to Stillwater in compliance with the Commission's minimum distance separation requirements and can be used at the site specified in Station KSPI-FM's outstanding construction permit (BPH-870225MI).[2] As requested, we shall also propose to modify the licenses of Station KOKL-FM to specify Channel 231C2 at Okmulgee and Station KSPI-FM to specify Channel 229C2 at Stillwater. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of adjacent Channel 231C2 at Okmulgee nor require Brewer Communications to demonstrate the availability of an additional equivalent channel for use by other interested parties. Section 1.420(g) does not apply to the substitution of channels at Stillwater since no upgrade in facilities is proposed for Station KSPI-FM.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the communities listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Okmulgee, Oklahoma	232A	231C2
Stillwater, Oklahoma	230C, 288A	229C2, 288A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **April 18, 1988,** and reply comments on or before **May 3, 1988,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Eugene T. Smith, Esq.
715 G Street, S.E.
Washington, D.C. 20003
(Counsel to petitioners)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See , Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73. 202 (b), 73. 504 and 73. 606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. However, members of the public should note that from the time a Notice of Proposed Rule Making is issued until the matter is no longer subject to Commission consideration or court review, all *ex parte* contacts are prohibited in Commission proceedings, such as this one, which involve channel allotments. An *ex parte* contact is a message (spoken or written) concerning the merits of a pending rule making other than comments officially filed at the Commission, or oral presentation required by the Commission. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who

filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Mark N. Lipp
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r), and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered, if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

FOOTNOTES

[1] Existing Class C stations operating below Class C minima, such as Station KSPI-FM, were given until March 2, 1987, to submit applications specifying Class C facilities. Those stations which did not seek to upgrade their facilities have been reclassified to reflect their actual operating power. Station KSPI-FM, however, has retained its Class C status since it timely filed an application, for which a construction permit is now outstanding, specifying the required facilities (BPH-870225MI).

[2] The coordinates for Station KSPI-FM, Stillwater, are: North Latitude 36o, 06', 33"; West Longitude 97o, 11', 43". The coordinates for Station KOKL-FM, Okmulgee, are: 35o, 50', 02"; West Longitude 96o, 07', 28".

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 84-14

In the Matter of

Amendment of Section 73.202(b),	RM-4601
Table of Allotments,	RM-4720
FM Broadcast Stations.	RM-4826
(Cookeville, Donelson, Livingston,	RM-5180
Lebanon, Celina, South Pittsburg,	RM-5181
Goodlettsville and Smyrna, Tennessee	RM-5182

MEMORANDUM OPINION AND ORDER

Adopted: January 27, 1988; Released: February 24, 1988

By the Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Report and Order* in this proceeding, 1 FCC Rcd 53 (1986), allotting FM Channel 229A to Celina, Tennessee, FM Channel 246C2 to Goodlettsville, Tennessee, and FM Channel 234C to Cookeville, Tennessee. That *Report and Order* also modified the license Station WGSQ, Cookeville, Tennessee, to specify operation on Channel 234C in lieu of Channel 232A. Currently before the Commission are petitions for reconsideration filed by William O. Barry, Bart Walker and Smyrna Broadcasting Corporation directed against three related actions contained in that *Report and Order*. Opposition pleadings were filed by Goodlettsville Community Broadcasting, Inc., Gallaher and Huffines, and John H. Heidelberg. Reply pleadings were filed by Smyrna Broadcasting Corporation and William O. Barry.

BACKGROUND

2. The *Notice* in this proceeding was issued as a result of a petition for rule making filed by Gallaher and Huffines, licensee of Station WGSQ, Cookeville, Tennessee, requesting the substitution of Class C Channel 234 in lieu of its existing Channel 232A allotment. Thereafter, Gallaher and Huffines proposed the additional allotment of Channel 246C to Cookeville in order to comply with the criteria adopted in *Modification of FM and Television Licenses*, 98 FCC 2d 916 (1984) which would permit the direct modification of the Station WGSQ license if another equivalent channel could be allotted to Cookeville for general application. In response to the *Notice*, we received a counterproposal from William O. Barry (Barry) proposing the allotment of Channel 233A to Lebanon, Tennessee. The Lebanon proposal was subsequently amended to Channel 246A which, in turn, conflicted with a pending petition to allot Channel 246C to Livingston, Tennessee. During the pendency of this proceeding, the Commission also had under consideration two counterproposals filed in response to the *Notice of Proposed Rule Making* in MM Docket No. 84-231 (the "omnibus proceeding) proposing Channel 246C2 to Goodlettesville, Tennessee and Channel 246C1 to Celina, Tennessee. Both of those proposals conflicted with the proposed uses at Cookeville and Livingston.

3. The Channel 246C proposals for Livingston, Goodlettesville and Celina, Tennessee were incorporated into this proceeding. Inasmuch as these proposals were not noticed in this proceeding and in view of the matters raised in reply comments by Gallaher and Huffines, we issued the *Further Notice of Proposed Rule Making*, 50 Fed. Reg. 33607, published August 20, 1985. In response to the *Further Notice*, we received counterproposals from Barry and Smyrna Broadcasting. Barry proposed Channel 246A to Donelson, Tennessee and Channel 231A to Woodbury, Tennessee. Smyrna Broadcasting proposed Channel 231A to Smyrna, Tennessee.

4. As stated earlier, the *Report and Order* allotted Channel 229A to Celina, Channel 246C2 to Goodlettesville and Channel 234C to Cookeville. In doing so, we dismissed or denied the other proposals. Included among these actions were the dismissals of the proposals for Channel 231A for Woodbury, and Channel 231 for Smyrna and the denial of the Channel 246A proposal for Lebanon. These latter three actions are the subjects of the three petitions for reconsideration. We will consider each of these petitions separately.

Petition for Reconsideration by William O. Barry

5. In his petition for reconsideration, Barry contends that the *Report and Order* only considered his Channel 246A proposal for Lebanon and did not specifically address his second proposal for Channel 234A for Lebanon. The Channel 234A proposal conflicted with the Channel 234C allotment to Cookeville. As a consequence, Barry argues that the Cookeville allotment was in error without considering his proposal for Lebanon. Barry also states that the *Report and Order* failed to allot an available channel to Donelson.

6. This argument does not warrant setting aside the allotment of Channel 234C to Cookeville. In regard to his proposal for Channel 234A in Lebanon, there was no expression of interest in applying for this proposed allotment. Thus, the Channel 234A proposal by Barry for Lebanon was not considered. *See Reno, Nevada and Redding, California*, 51 Fed. Reg. 2501, published January 17, 1986. Moreover, an engineering review of this Channel 234A proposal indicates that at that time it was suggested, there was a short- spacing to the 16 kilometer buffer zone of Class C FM Station WGGC, Glasgow, Kentucky.

7. We are also of the view that our action with respect to Donelson was not in error. In the *Report and Order*, we determined that under *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982), a Channel 246C2 allotment to Goodlettesville as a first local service would prevail over the proposed Channel 246A allotments to Lebanon or Donelson which both have at least one local service and receive other broadcast services. In regard to an available Channel 294A to Donelson referred to by Barry in his petition for reconsideration, we note that a petition for rule making has been filed by R. Dale Bay for Channel 294A in Donelson (RM-5791). In addition to the fact that there was no proposal for Channel 294A in Donelson advanced in the earlier proceeding, we believe that it is now more appropriate to consider such an allotment in connection with the pending petition for rule

making. That proceeding will also involve the competing proposal for Smiths Grove, Kentucky (RM-5742) and Mt. Juliet, Tennessee (RM-6017).

Petition for Reconsideration by Bart Walker

8. In the *Report and Order* we dismissed a counterproposal by William O. Barry for Channel 231A in Woodbury, Tennessee, because no party expressed an interest in applying for this allotment. Section 1.420(d) of the Rules requires a counterproposal to be advanced in initial comments. In this regard, a valid counterproposal must contain an expression of interest in applying for the channel if allotted. The *Report and Order* specifically stated that this defect was not eliminated by the subsequent late filed expression of interest in reply comments by Bart Walker for the Woodbury proposal. *Cf. Santa Isabel, Puerto Rico*, 51 Fed. Reg. 6119, published February 20, 1986. In his "Request for Reconsideration," Walker first states that due to the Commission's multiple ownership rule (Section 73.3555 of the Rules), Barry could not have applied for all of the proposed allotments he advanced. Rather, Walker contends that Barry was merely offering ways for the Commission to allot channels to additional communities. In this situation, Walker argues that he did not know of the Woodbury counterproposal until after the comment date and the reply comment date was the earliest that he could have expressed his interest in applying for a Woodbury allotment.

9. In the present situation, we do not believe that it would have been in the public interest to have accepted the late-filed expression of interest by Walker and considered the proposed Channel 231A allotment for Woodbury. Consideration of late filed expressions of interest in proceedings involving other proposals complying with applicable Commission requirements would be unfair to the other parties and undermine the integrity of the Commission processes. This procedural rule is designed to provide adequate time and opportunity to fully consider a valid counterproposal and avoid prejudice to competing parties by providing predictable uniformly applicable rules. In the present proceeding, Walker has not made a showing of good cause for acceptance of his late expression of interest. He could have participated in this rule making proceeding by filing his own timely counterproposal for Channel 231A at Woodbury.[1]

Petition for Partial Reconsideration filed by Smyrna Broadcasting Corporation

10. Smyrna Broadcasting Corporation (Smyrna Broadcasting) filed a counterproposal for Channel 231A at Smyrna, Tennessee, which conflicted with the Channel 234C upgrade at Station WGSQ, Cookeville. In the *Report and Order*, we dismissed this counterproposal because of a short spacing to the 16 kilometer buffer zone protection to first adjacent Class C FM Station WKTG, Madisonville, Kentucky. In its Petition for Partial Reconsideration, Smyrna Broadcasting contends that the 16 kilometer buffer zone protection requirement should not apply in this situation because the underlying petition for rule making in this proceeding was filed prior to the December 15, 1983, effective date of the buffer protection and, in any event, the licensee of Station WKTG waived its buffer zone protection in another rule making proceeding.

11. We have carefully reviewed this matter and have determined that Channel 231A in Smyrna can be accommodated by placing a site restriction of 3.4 kilometers northwest for the Smyrna allotment and 14.1 kilometers northeast for the Channel 234C upgrade at Cookeville.[2] The resulting Cookeville reference point would be short-spaced to the licensed facilities of Station WGGC, Channel 236C1, Glasgow, Kentucky. However, an application has been granted to relocate the Station WGGC transmitter site to permit its upgrade to Class C status (File No. BPH-8702241C). This new WGGC site would permit the Channel 234C upgrade at Cookeville in compliance with the Commission's minimum spacing requirements contingent on the grant of a license for the authorized Class C facilities at Station WGGC. [3]

12. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (2) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **April 11, 1988,** the FM Table of Allotments, Section 73.202(b) of the Rules, IS AMENDED with respect to the following community:

City	Channel No.
Smyrna, Tennessee	231A

13. The window period for filing applications on Channel 231A allotment in Smyrna, Tennessee will open on **April 12, 1988,** and close on **May 12, 1988.**

14. IT IS FURTHER ORDERED, That the aforementioned petitions for reconsideration by William O. Barry and Bart Walker ARE DENIED; and the aforementioned petition for reconsideration by Smyrna Broadcasting Corporation IS GRANTED to the extent indicated above.

15. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Bradley P. Holmes
Chief, Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Even though the counterproposal for Woodbury was defective, we do agree that a fulltime local service for Woodbury could be worthwhile. For this reason we have undertaken our own channel study and have determined that Channel 285A could be allotted to Woodbury with a 5.4 kilometer northwest site restriction. Accordingly, in a separate proceeding we shall go forward with a Notice of Proposed Rule Making proposing Channel 285A at Woodbury. The reference coordinates for this allotment would be 35 51' 09" and 86 07' 19".

[2] The reference coordinates for the Smyrna allotment would be 35 59' 46" and 86 33' 08" and the Cookeville allotment would be 36 13' 15" and 85 21§ 47".

[3] In this connection, we note that Gallaher and Huffines, licensee of Station WGSQ, have filed an application to implement the Channel 234C upgrade at Cookeville (File No. BPH-870331IQ). This application requires the grant of a 2 kilometer short-spacing waiver with respect to Station WIKQ, Greenville, Tennessee and also involves a 4-kilometer short-spacing to Station

WSMT, Sparta, Tennessee. However, Station WSMT has an application pending to relocate its transmitter at a site which would not involve a short spacing with respect to the pending WGSQ application. In the event that this WGSQ application can be ultimately granted, we would not have to await the licensing of the Station WGGC transmitter site relocation.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Exchange Carrier Association
Revisions to Tariff
F.C.C. No. 1 and 285

Transmittal Nos. 274

ORDER

Adopted: February 11, 1988; Released: February 12, 1988

By the Chief, Common Carrier Bureau:

1. On December 18, 1987, the National Exchange Carrier Association (NECA) filed Transmittal No. 274 on behalf of the Puerto Rico Telephone Company (PRTC), to provide interim access for off-island service from the island of Puerto Rico. The tariff was further revised by Transmittal No. 285, filed on February 9, 1988, and is scheduled to become effective on February 16, 1988. American Telephone and Telegraph Company (AT&T) and CALL U.S., Inc. (Call-US) petitioned to reject the proposed tariff revisions.[1] PRTC and Call-US filed responsive pleadings.

2. AT&T argues that PRTC's proposed tariff revisions are unlawful and anticompetitive, and that they violate Commission Orders and have been made in disregard of FCC requests for explanation and cost justification. AT&T complains that PRTC continues to refuse to supply the requested detailed cost justification for the rates it proposes to charge its competitors. AT&T Petition at 3-6. AT&T further states that the current filing violates in various ways the explicit terms of the Commission's *Puerto Rico Facilities Order*. *Id.* at 5-8 (citing 2 FCC Rcd 6608, 6609, 6610-11).[2] Finally, AT&T asserts that the fact of NECA's filing on PRTC's behalf indicates some potentially anticompetitive acts, as it arbitrarily assigns "choice" codes to PRTC. *Id.* at 8.

3. Call-US complains that PRTC will provide ANI and answer supervision for its own long-distance service, and that its refusal to do so for feature group B (FGB) and feature group C (FGC) users is anticompetitive. Call-US Petition at 3. Call-US further asserts that PRTC has already limited competition by enforcing a rule against resale of service within Puerto Rico, and argues with PRTC's proposal to provide interim FGB and FGC service at premium rates. *Id.* at 6.

4. PRTC replies that its proposed tariff revisions are fully justified by the *Puerto Rico Facilities Order*. It charges that AT&T's objection to premium rates for five-digit access as well as for three-digit access is in direct contrast to AT&T's opposition to PRTC's earlier filed Transmittal No. 220, when AT&T argued that all carriers should be charged premium access rates. Further, PRTC notes, the *Puerto Rico Facilities Order* makes it clear that all carriers (including PRTC itself, when it seeks to enter this market) must pay the full premium access charges. In view of this direct Commission requirement, and of its participation in the NECA pool, PRTC argues, AT&T's demand for cost justification is superfluous. *Id.*

5. In response to Call-US, PRTC states that it does not provide ANI and ADS to AT&T, and will not provide these services to its own off-island services. PRTC Opposition at 7-8. Further, PRTC states, it will provide billing and collection services to its own off-island service, to AT&T, and to other interexchange carriers at the same rates and upon request. *Id.* Finally, PRTC rejects the Call-US arguments regarding PRTC's intra-island toll service. *Id.*

6. The Common Carrier Bureau has reviewed the proposed revisions, the petitions and PRTC's reply. We find that no compelling argument has been presented that the proposed tariff revisions are so patently unlawful as to require rejection, and that an investigation of the revisions is not warranted at this time.[3]

7. Accordingly, IT IS ORDERED that the petitions filed against Exchange Carrier Association Tariff F.C.C. No. 1, Transmittals No. 274 and 285, by the above-named petitioners ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] The pleading submitted by Call-US is titled "Reply Comments," but constitutes a petition to reject. It was timely filed, and will accordingly be referred to as the Call-US Petition.

[2] Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service Off the Island of Puerto Rico, CC Docket No. 86-309, FCC 87-304, 2 FCC Rcd 6600 (1987) (*Puerto Rico Facilities Order*). In this Order, the Commission concluded that competition in the domestic and international off-island markets is feasible and would promote the public interest. The Commission established a number of requirements for PRTC's entry into the relevant off-island markets, based on PRTC's status as government-owned entity and the monopoly local exchange carrier (LEC).

[3] We note that, pursuant to the terms of the *Puerto Rico Facilities* Order and of the Competitive Carrier decisions, 95 FCC 2d 554 (1983) and 98 FCC 2d 1191 (1984), PRTC will provide neither direct nor resold off-island service until authorized to do so.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Channel 64 Joint Venture, Debtor in Possession — BRCT-87061OKE

For Renewal of License of Station WIII(TV), Cincinnati, Ohio

Channel 64 Joint Venture Debtor in Possession (Assignor) — BALCT-870930LC

and

Channel 64 Acquisition, Inc. (Assignee)

For Assignment of License of Station WIII(TV), Cincinnati, Ohio

DECISION

Adopted: February 9, 1988 Released: February 24, 1988

By the Commission:

1. This case involves the application seeking Commission consent to the assignment of license of station WIII(TV), channel 64, Cincinnati, Ohio (Ind.), from Channel 64 Joint Venture, Debtor in Possession (Joint Venture), to Channel 64 Acquisition, Inc. (Acquisition). Acquisition is a wholly owned subsidiary of United Cable Television Corporation (United). As a debtor in possession, Joint Venture is under the protection of the United States Bankruptcy Court for the Southern District of Ohio (the Bankruptcy Court). Station WIII(TV) is currently operating, despite its financial difficulties. In connection with the assignment application, Acquisition has filed a "Petition for Ruling or Waiver," concerning the applicabilitiy of the multiple-ownership rule, 47 C.F.R. § 73.3555. We also consider here Joint Venture's application for renewal of the station WIII(TV) license.

BACKGROUND

2. Station WIII(TV) was formerly controlled by United, through a subsidiary. In 1984, after Commission approval, United assigned the station's license to Channel 64 Joint Venture, in which United retained a ten percent interest as one of two joint venturers. At that time, United received a promissory note from Channel 64 Joint Venture, secured by liens on the station's assets. The licensee encountered financial difficulties and, as noted, is now under the protection of the Bankruptcy Court. The Commission granted an involuntary assignment of license to the licensee as debtor in possession on March 31, 1987. Subsequently, Joint Venture found a buyer[1] and filed an application seeking Commission approval for the sale. A dispute developed, however, between creditors whose interests were unsecured and United, a secured creditor. The unsecured creditors asserted that United's interests should be "equitably subordinated" to their claims. That issue has not been decided by the Bankruptcy Court. Acquisition states:

> The unsecured creditors have recognized that full litigation to final disposition of their equitable-subordination claim could consume months if not years of time, could consume substantial resources that might significantly detract from the economic value of any proceeds from any disposition of the assets of the Joint Venture, . . . and in any event involve uncertainty of final determination.

Faced with the prospect of extended litigation and uncertainty, the unsecured creditors determined, according to Acquisition, that the then-pending proposed sale was not in their best interests and the application was dismissed. Acquisition states that "the prospect of such litigation would likely prevent *any* third party from attempting to rescue the station." (Emphasis in original.)

3. Thereafter, the parties filed the assignment application now before us. That application proposes that United, through Acquisition, will reacquire station WIII(TV). The unsecured creditors approved the proposal, which avoids litigating the equitable subordination issue because United will satisfy the claims of the unsecured creditors. The Bankruptcy Court later approved the proposed sale on November 18, 1987. Acquisition states that the proposed sale "is not only the most promising but, realistically, the *only* hope that WIII will survive as an operating station." (Emphasis in original.) Acquisition states that its proposed repurchase of the station is a temporary step designed to keep a bankrupt station on the air. It also states that it has already agreed to reassign the license to a third party, which has until May, 1988, to perfect its financial plans. Although United would retain an interest in the successor licensee, United states that its interest will be nonattributable because of the existence of a single majority stockholder, *see* Note 2(b) to 47 C.F.R. § 73.3555 and *Attribution of Ownership Interests*, 97 F.C.C.2d 997, 1008-09 (1984), *reconsidered on other grounds*, 58 R.R.2d 604 (1985), *further reconsidered*, 1 F.C.C. Rcd. 802 (1986) (*Attribution)*, or by use of the "multiplier." *See* Note 2(d) to 47 C.F.R. § 73.3555 and *Attribution*, 97 F.C.C.2d at 1018-19.

4. After the filing of the present assignment application, counsel for the Equitable Life Assurance Society of the United States (Equitable) advised counsel for Acquisition of a conflict with the multiple- ownership rule, if the transaction is closed as proposed. Equitable has ownership interests that exceed the attribution benchmarks in United and in Multimedia, Inc. (Multimedia), licensee of station WLWT(TV), channel 5, Cincinnati, Ohio (NBC). The Grade B contour of station WLWT(TV) encompasses the Grade B contour of station WIII(TV). Holding attributable interests in the licensees of both stations is prohibited by 47 C.F.R. § 73.3555(a)(3) and *Attribution*, 97 F.C.C.2d at

999-1000 n. 4. In light of this, Acquisition filed its petition requesting a ruling that Equitable's interests be accorded nonattributable status. In the alternative, it seeks a one-year waiver of section 73.3555(a)(3).

5. Equitable's interests are as follows. Equitable holds in its own name or through wholly owned subsidiaries a total of 12.7 percent of United's stock, but states that it and its subsidiaries have voting rights only as to 8.6 percent of the United shares. Equitable, as an insurance company claiming passive status, would ordinarily be considered to have an attributable interest at or above ownership of ten-percent of United's voting shares. *See* Note 2(c) to 47 C.F.R. § 73.3555 and *Attribution*, 97 F.C.C.2d at 1012-13. However, the bulk of Equitable's United stock (12.57 percent total, with voting rights as to 8.46 percent of the shares) is held by a wholly owned subsidiary, Alliance Capital Management Corporation (Alliance), an investment advisor. Alliance is considered to have an attributable interest in a licensee corporation and its subsidiaries at or above the five-percent level. *See* Note 2(b) to 47 C.F.R. § 73.3555 and *Attribution*, 97 F.C.C. 2d at 1014-15. Thus, Alliance has an attributable interest in United.

6. Similarly, Equitable and its subsidiaries hold 12.15 percent of the shares of Multimedia, of which 10.65 represents its voting interest. Alliance holds a total of 7.5 percent of the Multimedia shares, voting 5.7 percent of them. Alliance, therefore, also has an attributable interest in Multimedia.

DISCUSSION

7. For reasons that follow, we believe that a one-year waiver of the rule will serve the public interest in the circumstances presented. For that reason, we need not address Acquisition's alternative request for a ruling that Equitable's interests in Multimedia and Acquisition should be accorded nonattributable status.

8. Acquisition advances several reasons why it believes that the public interest will be served by a one-year waiver of the multiple- ownership rule and by a grant of the assignment application. We agree with its assessment. First, although Equitable's interests are *prima facie* attributable, they are not controlling interests. Second, the waiver is for a limited period. Acquisition has already taken steps to reassign the license in a manner that will eliminate any conflict with the rule. In fact, United's buyer may acquire control of station WIII(TV) by mid-1988.[2] Third, the court has stated that the Commission, in making its own public interest determinations, should consider other federal policies, to the extent possible. *See LaRose v. FCC*, 494 F.2d 1145, 1146-47 n.2 (D.C. Cir. 1974).[3] We have previously given weight to the findings of a bankruptcy court in dealing with other aspects of the multiple-ownership rule. *See Telemundo, Inc. v. FCC*, 803 F.2d 513 (D.C. Cir. 1986). In the case now before us, the Bankruptcy Court has reviewed and approved a plan that, among other things, proposes the sale of WIII(TV) to Acquisition so as to serve the goals underlying the bankruptcy laws generally, and the innocent creditors of Joint Venture specifically. Thus, grant of the assignment application will accommodate another important federal policy. Finally, Acquisition has represented that, without relief, "it is virtually certain that the failing WIII will be forced to go dark and Cincinnati residents will lose a valuable television service." In that connection, it appears that a sale to any party except United would result in litigation between United and the unsecured creditors as to the unresolved "equitable subordination" issue, introducing considerable delay. We believe, in the context of this case, that it makes little sense to insist on strict application of the multiple-ownership rule to assure maximum diversity of programming viewpoints, if the result of that insistence would force the station off the air and thereby diminish diversity by the complete loss of the station's programs. We conclude, therefore, based on the representations made and the circumstances of this case, that a one-year waiver of section 73.3555(a) of the Commission's Rules will better serve the public interest than following the terms of the rule. In reaching that conclusion, we specifically rely on Acquisition's representation that it will sell the station within the period requested.

RENEWAL APPLICATION

9. Except for the fact that Joint Venture is a debtor in possession, the grant of the renewal application is fully consistent with the public interest. Normally, we do not grant renewal applications to temporary licensees under court supervision, such as where the licensee is a trustee in bankruptcy, a receiver or, as here, a debtor in possession. *See* e. *g., D. H. Overmyer Telecasting Co.*, 94 F.C.C.2d 117, 124 (1983); and *Gulf Coast Radio, Inc.*, 45 F.C.C. 1865, 1867 (1964). In this case, however, to remove any administrative hurdles and to aid in the prompt assignment of the WIII(TV) license to a qualified buyer that will keep the station on the air, we shall also grant the station's renewal application, subject to the condition that it will revert to pending status if the assignment to Acquisition is not consummated.

CONCLUSION

10. We find that the applicants are fully qualified and that a grant of the waiver request and the applications, as conditioned, will serve the public interest, convenience and necessity.

11. Accordingly, IT IS ORDERED, That the petition of Channel 64 Acquisition, Inc., for waiver of section 73.3555(a)(3) of the Commission's Rules IS GRANTED for a period of one year from the date of closing of the station WIII(TV) purchase.

12. IT IS FURTHER ORDERED, That the application (BRCT-870610KE) for renewal of license of station WIII(TV), IS GRANTED, subject to the condition that the application will revert to pending status if the proposed assignment of license to Channel 64 Acquisition, Inc., is not consummated.

13. IT IS FURTHER ORDERED, That the application (BALCT-870930LC) to assign the license of station WIII(TV) from Channel 64 Joint Venture, Debtor in Possession, to Channel 64 Acquisition, Inc., IS GRANTED.

14. The Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster, III
Acting Secretary

FOOTNOTES

[1] That buyer was TV Acquisition Corp., which is not related to the buyer now before us.

[2] Acquisition has asked for a one-year waiver to cover the possibility that the proposed buyer may be unable to obtain the necessary finances, requiring a search for another buyer that has the needed financial resources.

[3] *LaRose*, as here, involved a station in bankruptcy. Unlike *LaRose*, there are no substantial and material questions of fact as to whether the seller, Joint Venture, possesses the requisite qualifications to be a Commission licensee.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

UTICA CELLULAR TELEPHONE
COMPANY,
Complainant,

v. File No. E-88-35

UTICA-ROME CELLULAR
PARTNERSHIP,
Defendant.

ORDER

Adopted February 1, 1988; Released: February 24, 1988

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On November 23, 1987, Utica Cellular Telephone Company (Utica), the non-wireline cellular licensee in the Utica, New York market, filed a formal complaint against the wireline licensee, Utica-Rome Cellular Partnership (URCP). In its complaint, Utica alleged that URCP's application for a cellular radio station license contained engineering statements that were not in compliance with the Commission's rules and which became incorporated into its license. Utica alleges that, due to anomalies in Commission procedural rules, it had no opportunity to object to these engineering statements prior to the grant. As a result, Utica states, the Commission authorized URCP to operate at a power level in excess of the maximum effective radiated power allowed for in section 22.506 of the Commission's rules, 47 C.F.R. § 22.506. In its answer, URCP advised us that it had adjusted the power outputs of its transmitter to conform to the rules and filed the appropriate notification with the Commission, thereby satisfying the complaint.

2. Subsequently, on January 20, 1988, Utica filed a motion to dismiss the complaint without prejudice. It appears that the parties have resolved the present controversy, and we therefore find that granting Utica's request would be in the public interest.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in 47 C.F.R. § 0.291, that Utica Cellular Telephone Company's request to dismiss the above-referenced complaint IS GRANTED without prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS, INC.,
Complainant,

v. File No. E-86-100

PACIFIC BELL
Defendant.

ORDER

Adopted February 12, 1988; Released: February 24, 1988

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On June 27, 1986, AT&T Communications, Inc. (AT&T) filed a complaint against Pacific Bell alleging that Pacific Bell's billing of Feature Group C terminating switched access usage was at variance with AT&T's actual usage and, therefore, violated Section 201(b) of the Communications Act, 47 U.S.C. 201(b). Pacific Bell denied such allegations and moved to dismiss the complaint. After the pleading cycle ended, the parties entered into negotiations, including consultation with the Enforcement Division, aimed at settling the matters in controversy. By joint motion filed February 3, 1988, the parties advised the Commission that they have reached a mutually satisfactory settlement and requested that the complaint be dismissed with prejudice.

2. We have carefully reviewed this matter and, in accordance with Section 1.713 of the Commission's rules, 47 C.F.R. § 1.713, we find that the public interest would be served by dismissing the complaint.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the joint motion to dismiss the above-captioned proceeding IS GRANTED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Howard M. Wilchins
Deputy Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

GEN. Docket No. 87-112

In the Matter of

Development and Implementation
of a Public Safety National Plan
and Amendment of Part 90
to Establish Service Rules
and Technical Standards for Use
of the 821-824/866-869 MHz Bands
by the Public Safety Services.

REPORT AND ORDER

Adopted: November 24, 1987; Released: December 18, 1987

By the Commission: Commissioner Dawson not participating; Commissioner Quello concurring in the result and issuing a separate statement.

I. INTRODUCTION

1. By this action, the Commission adopts policies, procedures and rules that constitute a national plan for public safety services (National Plan). In particular, the Commission is adopting service rules and technical standards for the 821-824/866-869 MHz bands, which the Commission allocated for public safety use in an order adopted July 24, 1986.[1] This National Plan, which we developed in response to a Congressional directive,[2] will ensure that the new channels are used effectively and efficiently for important public safety functions such as crime control, firefighting, and emergency medical services.

2. Adequate mobile communication for agencies charged with protecting the public welfare is of critical importance to the overall well- being of this nation. Every person in the country is dependent directly or indirectly on the myriad services provided by public safety and emergency medical entities. These services include such things as crime control and prevention, dispatching ambulances, coordinating highway crews during weather or traffic emergencies, firefighting and prevention, and detecting and controlling fires in the almost one-half billion acres of non-federal forests. Two-way radio provides a vital component in this nation's public safety and emergency medical infrastructure. Agencies involved in the protection of life and property are able to do their jobs effectively and efficiently only by making extensive use of a wide array of mobile communications options available to them. Full use of these options requires that adequate spectrum be made available and that its use be well planned and coordinated to assure that the diverse needs of public safety entities can be satisfied. To this end, the Commission has allocated 6 megahertz of spectrum for these services and is adopting this National Plan to assure that adequate and appropriate frequencies are available to those who serve and protect our way of life.

3. As the Commission stated in its *Notice of Proposed Rule Making* in this proceeding, we have two broad objectives in developing this National Plan. First, we intend to facilitate *interoperability* between communications systems to permit local, state, and federal agencies to coordinate their activities. Second, we intend to ensure *efficient use of the spectrum allocated for public safety*. [3]

4. In this *Report and Order*, we set national guidelines for use of the spectrum while allowing regional public safety planning committees to develop regional plans tailored to their areas§ own particular communications needs.[4] It is the Commission's belief that while certain technical concerns must be addressed at the national level, the great diversity of needs in different areas of the country demand that input also be obtained at the state and local levels. Therefore, the National Plan, while focusing on general spectrum allocation issues, also provides a framework for regional planning. In this way, the Plan provides overall guidance on the use of new spectrum by the public safety services and also serves as an umbrella for the development of regional public safety plans. These plans will be prepared by regional planning committees, under the general oversight of the Commission, and will address the unique spectrum allocation requirements of the public safety and governmental authorities of the regions. By using the two-pronged approach of regional as well as national planning, we will satisfy the Commission's responsibility to provide spectrum for all of the country's public safety and special emergency entities, while also providing sufficient flexibility to allow regional planners to develop efficient and effective solutions to local public safety problems.

II. BACKGROUND

5. In December 1983, the United States Congress directed the Commission to establish a plan to ensure that the communications needs of state and local public safety authorities would be met. Congress specified that the Commission should: (1) review current and future needs of public safety authorities, and (2) consider the need for a nationwide frequency allocation. *Authorization Act*, *supra* note 2, § 9(a).

6. In a *Notice of Inquiry* issued on March 7, 1984, the Commission solicited comments from the public safety community and other interested parties on many issues, including present and future public safety communications needs, the utility of new technologies to public safety applications, and coordination of federal, state, and local communications concerns.[5] We received and evaluated almost 300 comments in response. These comments formed the basis for the *Staff Report* issued by the Commission's Private Radio Bureau (the Bureau) on August 1, 1985.[6] In its *Staff Report* the Bureau identified the communications needs of public safety authorities and suggested options to meet those needs. One option the Bureau identified was the allocation of additional frequencies at 821-825 MHz and 866-870 MHz for public safety use nationwide.[7]

7. On September 19, 1986, the Commission issued the *Allocation Order* allocating 6 megahertz of spectrum for public safety use. *Allocation Order*, *supra* note 1, 2 FCC Rcd at 1838, para. 99. The Commission selected the 821-824 MHz and 866-869 MHz bands because they were adjacent to frequencies already used for public safety purposes, thereby providing for expansion of, or interoperability with, existing public safety communications systems

already licensed in the 806-821/851-866 MHz bands.[8] In order to be certain that the newly allocated frequencies would be used efficiently, we specified that the frequencies could not be used until we had adopted a National Plan for public safety spectrum utilization. We noted the importance of public participation in development of the plan and stated our intention to seek guidance from the public safety community and other interested members of the public. *Id.* at 1838, para. 99.

8. In December 1986, the Commission established the National Public Safety Planning Advisory Committee (NPSPAC or Committee) to involve parties interested in public safety in the planning effort. *Notice* at 2869, para. 3. NPSPAC had open membership, and all interested parties were invited to participate in its meetings. We directed NPSPAC to:

> (a) identify communications requirements of public safety services; (b) develop a scheme for efficient use of the new frequencies; (c) develop a scheme to increase utility of existing public safety frequencies; (d) recommend the manner in which new technologies can be applied to public safety frequencies; and (e) recommend guidelines to ensure compliance with the National Plan.[9]

NPSPAC issued its Initial Report to the Commission in March 1987.[10] In this report, NPSPAC discussed a wide variety of topics in three general categories: developing regional plans, use of the allocated frequencies, and meeting technical requirements.

9. On May 15, 1987, the Commission issued a *Notice of Proposed Rule Making* proposing policies and rules for the National Plan. *Notice of Proposed Rule Making*, Gen. Docket No. 87-112, 2 FCC Rcd 2869 (1987) (*Notice*). The *Notice* envisioned the National Plan as an overall spectrum management approach consisting of policy guidelines, technical standards, and procedures to satisfy public safety communications needs for the foreseeable future.

10. The Commission proposed a structure for the National Plan that consisted of both national and regional planning aspects. Under the proposal, the United States would be divided into regions. The regions would have as much autonomy as possible, within the framework of the National Plan, to develop regional plans that meet their different communications needs. *Notice*, 2 FCC Rcd at 2870, para. 7. The *Notice* identified certain common national requirements. Specifically, the *Notice* identified requirements pertaining to intercommunication channels, a channeling plan, use of trunking, return of unused frequencies, and technical standards to control interference. Plans were to be developed for each region by the public safety entities in those regions. The regional plans were to focus on the spectrum requirements of all these entities and determine how the available spectrum could best be used to satisfy these requirements. The Commission asked for public comment on the policies proposed in the *Notice* and on NPSPAC's *Initial Report*, which we attached as an Appendix to the *Notice*. In September 1987, NPSPAC submitted its *Final Report* to the Commission.[11] The Commission issued a public notice soliciting comment on NPSPAC's *Final Report*.[12]

III. STRUCTURE OF THE NATIONAL PLAN

A. *Description*

11. In the *Notice* we indicated that the National Plan would establish common elements and guidelines for the development of regional plans. *Notice*, 2 FCC Rcd at 2870, para. 8. Regions were to be left free to identify specific users and their spectrum requirements. The purpose of this dichotomy between the National Plan and the regional plans is to balance our primary regulatory objectives of maximizing spectrum efficiency and ensuring that the system has sufficient flexibility to accommodate the wide variety of specific communication requirements in different areas of the country. Thus, as stated in the *Notice*, the National Plan serves as an umbrella over the regional plans.

B. *Eligibility*

12. Our *Notice* proposed to make "public safety authorities," defined as entities licensed in the Public Safety Radio Services and the Special Emergency Radio Service (SERS), eligible to operate in the new public safety bands, 821-824/866-869 MHz. *Notice*, 2 FCC Rcd at 2869, para. 6.[13] Several public safety agencies argued that in the major metropolitan areas, where demand for spectrum is heavy, SERS eligibles should be excluded from this spectrum. They maintained that in some areas the Public Safety Radio Services will require the entire available spectrum and that these requirements should be given priority over the SERS. *See* , *e. g.*, Comments of Los Angeles Police Department at 2. Other commenters argued that regional planning groups should have the latitude to include certain SERS eligibles, depending on the availability of spectrum and the public safety role of each SERS eligible in that region. *See* , *e. g.*, Joint Comments of Port Authority of New York and New Jersey and New York Metropolitan Area Committee for Public Spectrum Relief at 4. SERS proponents argue that they play an integral role in public safety and should be made eligible. *See* , *e. g.*, Reply Comments of American Hospital Association at 2.

13. The Public Safety Radio Services and the Special Emergency Radio Service are both involved with public safety. There are, however, many types of eligible entities within each of these two broad service categories. The various eligible entities within these categories have different roles and responsibilities in public safety that vary from one region to the next. For example, school buses, which are eligible under the SERS, are included in emergency evacuation plans in some areas and not in others. Similarly, the Forestry-Conservation Radio Service, which is included in the Public Safety Radio Services, may have a limited role in public safety in metropolitan areas like New York City. Since both the Public Safety Radio Services and the SERS play important roles in public safety in many areas, we continue to believe it necessary to make both services eligible to operate in the 821-824/866-869 MHz bands. We recognize, however, that in some regions it may not be possible to grant requests for assignments in the new 800 MHz spectrum to everyone who is eligible. In such cases, the highest priority must be given to those organizations most fundamentally involved in protection of life and property. We believe that regional planning committees are in the best position to determine which services are of the greatest importance to public safety in their regions. Therefore, we will leave it to the regional

committees to make such determinations as needed in developing regional plans. Where regional plans do not accommodate all eligible entities, we will require an explanation of the criteria used to determine which eligible entities are to be given assignments. *See* para. 51, *infra*.

C. *Common Elements of Regional Plans*

14. To ensure that the National Plan encourages the most efficient utilization of the available spectrum and fosters interoperability between users, it is necessary to establish minimal technical standards for the regional plans.

1. *Channeling Plan*

15. The *Notice* proposed a 12.5 kHz channeling plan for the new 800 MHz public safety bands.[14] *Notice*, 2 FCC Rcd at 2871, para. 15. This proposal was consistent with the channeling plan adopted for the new private land mobile radio spectrum at 900 MHz. *Allocation Order*, 2 FCC Rcd at 1835, para. 74. To satisfy public safety's growing need for specialized transmissions such as high speed data transmission and encryption techniques, which generally require more than 12.5 kHz of bandwidth, and to foster compatibility with existing public safety operations in the 806-821/851-866 MHz bands, which use 25 kHz channels, the *Notice* proposed to permit the stacking of two 12.5 kHz channels to form one 25 kHz channel. The *Notice* stated that this approach would encourage spectrum-efficient technology without precluding system compatibility with existing equipment, digital transmissions, or other specialized technologies. *Notice*, 2 FCC Rcd at 2871, para. 15.

16. NPSPAC's *Final Report* stated that the channeling plan for the new spectrum should satisfy a variety of current and future public safety needs including: (1) interoperability among users of the new allocation and those of the lower adjacent band; (2) interoperability on common mutual aid channels; (3) the capability for expansion or modification of systems in either band; (4) the capability for voice encryption; (5) the capability for high speed digital data transmission; and (6) the increasing demand for federal, state, and local interagency communications of both inter- and intra- discipline modes. *Final Report*, *supra* note 11, at 13. In order to satisfy these needs, the *Final Report* recommended a channeling plan based on 25 kHz channels spaced every 12.5 kHz, commonly referred to as an offset plan.[15]

17. NPSPAC stated that compatibility between existing and new equipment would be poor under the Commission's proposal because of the different bandwidths. Dual bandwidth equipment would be more costly, and no such equipment currently exists, according to NPSPAC. The Committee asserted that no commercially available high security digital voice encryption products will operate effectively at 12.5 kHz channel bandwidths. Further, NPSPAC indicated that many current digital data transmission techniques require 25 kHz bandwidth. A 12.5 kHz bandwidth would both exclude some current products, and limit future high speed digital applications, according to the Committee. *Final Report* at 15.

18. Based on the results of various independent studies, NPSPAC concluded that the 25 kHz offset plan is nearly as spectrum efficient as the Commission's 12.5 kHz plan. *Final Report* at 15-17. In particular, NPSPAC cited a computer analysis of channel assignments in the Dallas/Fort Worth area that Motorola, Inc. performed.[16] Because of adjacent channel protection requirements, a 12.5 kHz channelization plan would not yield twice as many channels as a 25 kHz channelization plan in any geographic area. The analysis showed that the spectrum efficiency of 25 kHz offset assignments is approxi- mately ninety percent of that of 12.5 kHz assignments. Therefore, NPSPAC argued that the Commission's proposed 12.5 kHz channeling plan would offer no significant improvement in spectrum utilization efficiency over the recom- mended 25 kHz offset plan. *Final Report* at 16-17.

19. Public safety interests strongly endorsed NPSPAC's recommendation. In particular, many commenters emphasized that lack of compatibility would impede their ability to expand existing systems. *See e. g.*, Comments of Connecticut Department of Public Safety to *Notice* at 5. They argued that the requirements of the public safety services are different from the requirements of users of the 896-901/935-940 MHz private land mobile band, where the predominant requirement is voice communications, there is minimal need for interoperability with existing systems, and there is little demand for encryption. Comments of General Electric Company at 5. These commenters noted that the Commission allocated the 821-824/866-869 MHz spectrum to public safety largely because of its adjacency to existing public safety spectrum. They argued that adopting a different channeling scheme for the two bands would remove the possibility of expanding existing systems. In addition, the Los Angeles Police Department stated that the split channel plan would "prohibit interoperability with existing systems [operating in the 806- 821/851-866 MHz bands], seriously complicate encryption potential, render existing equipment unusable, and force an unproven technology on the public safety community." Comments of the Los Angeles Police Department at 2. Motorola also argued that a channel plan that would properly align the center frequencies of the old and new channels to permit interoperable communications would overlap three 12.5 kHz channels. Comments of Motorola at 6.

20. Many commenters attempted to show that the offset plan and related technical enhancements would create a number of usable channels approaching that of the split channel plan. For example, Omnicom, Inc. conducted a detailed technical analysis and, after accounting for the nationwide mutual aid channels, mobile digital terminals, and digital encryption, concluded that the proposed split channel option provides no significant improvement in spectrum efficiency over the offset plan. Comments of Omnicom to *Final Report* at III-5.

21. On the other hand, few commenters supported the proposed 12.5 kHz channeling plan. This support was based largely on the position that this scheme would foster the most efficient utilization of the spectrum given the state-of-the-art technology. The American Petroleum Institute (API) noted that the Commission cited spectrum efficiency when it recently adopted a 12.5 kHz channeling plan for private land mobile use in the 896-901/935-940 MHz bands. API contended that the same consideration should apply to the public safety services. Comments of API at 6. The Special Industrial Radio Service Association (SIRSA) stated that the fears expressed by the public safety community regarding use of unproven equipment are unwarranted. SIRSA contended that in the time before

a National Plan is implemented, the cost of 12.5 kHz equipment will decline and technical improvements will occur. Comments of SIRSA at 6.

22. We have carefully reviewed the information that has been presented on this issue. We are persuaded that for the new public safety band the 25 kHz offset channeling plan recommended by NPSPAC should be adopted. This channeling plan will provide for interoperability with the existing 800 MHz public safety systems, a major consideration in making the allocation. The benefits to the public of interoperability, *i. e.*, faster, better coordinated response of public safety authorities in emergencies, should be substantial. We agree that the recommended 25 kHz offset channeling plan yields a slight reduction in spectrum efficiency relative to a 12.5 kHz plan. This reduction, however, is outweighed by other factors. Among these factors is the need to accommodate sophisticated digital encryption systems and digital data communications systems used in many public safety vehicles today. In light of these factors, we are adopting the 25 kHz offset channeling plan.

23. Because an offset plan requires geographic separation of transmitters operating on adjacent frequencies, the *Final Report* further recommended that transmitters and receivers operating in the new band be of enhanced design so as to minimize the necessary separation.[17] The commenters generally supported NPSPAC's recommendation for transmitter specifications. General Electric, however, is opposed to applying the recommended receiver selectivity standards to portable communications equipment.

24. We are adopting the technical standards for transmitters recommended by NPSPAC for equipment operating in the new bands. We are taking this action in conjunction with the adoption of the 25 kHz offset channeling plan. Adopting these technical standards will reduce adjacent channel interference, permitting closer geographical channel re-use and thereby improving overall spectrum utilization.

25. We are not, however, adopting the receiver standards recommended by NPSPAC. Historically, the Commission has not adopted standards for receiver performance, and we are not persuaded that standards are essential here. Sub-standard receivers do not cause system interference, nor do they threaten effective operation of the public safety network, as would sub- standard transmitters. Public safety agencies can make their own determinations as to whether upgrading their receivers would be cost-effective.[18] Manufacturers are, of course, free to adopt NPSPAC's recommendations as to receiver standards.

2. *Mutual Aid Channels*

26. A primary objective of the National Plan is to improve the ability of public safety entities to communicate with one another. *See Notice*, 2 FCC Rcd at 2869, para. 4. Therefore, the Commission proposed to set aside a number of common channels in the new public safety bands on a nationwide basis for coordination and intercommunication purposes. The *Notice* recognized that some regions may require greater interagency communications capability than provided by the nationwide channels and suggested that the individual regions might wish to designate additional intercommunication channels depending on the needs in their respective areas. *Id.* at 2870, para. 12.

27. NPSPAC recommended designating five intercommunication channels on a nationwide basis and that one of these channels be designated as the National Public Safety Calling Channel, with the remaining four channels as tactical channels. *Final Report* at 5. The operation and management of these channels would be identified specifically in the respective regional plans.[19]

28. The *Final Report* recommended that the intercommunication channels be available for federal, state and local disaster management and other emergency situations, but that regions have the option to include other public safety disaster relief or emergency management services in the regional mutual aid network. *Final Report* at 5. Finally, the *Final Report* recommended that: (1) all mobile and portable radios be equipped to operate on the five channels, (2) channel assignments adjacent to the five mutual aid channels be spaced no closer than 25 kHz, and (3) these channels should operate in the conventional mode (non-trunked) with tone coded squelch at a standard frequency of 156.7 Hz to minimize the effects of intermodulation interference. NPSPAC recommended that there be no barrier to regional planning groups identifying additional mutual aid channels in their regions and providing operational guidelines for their use. *Id.* at 7, 17, 21.

29. The commenters were generally unified in their support of the national mutual aid concept. *See , e. g.*, Comments of City of Milwaukee at 2; Comments of the City of Compton at 3. One of the few commenters opposing the mutual aid concept was the City of Oakland, which indicated that "the opportunity for interoperability is sufficient, mandatory interoperability in a single area of the spectrum is inappropriate." Comments of the City of Oakland at 1.

30. We agree that there is a great need for intercommunication. Dedication of channels for the express purpose of intercommunication in non- routine, critical situations will provide public safety agencies with the means to coordinate their responses more effectively. We emphasize that these channels are not intended for routine, administrative, intra-agency communications but are to be reserved for coordination of multiple public safety entities. We shall, therefore, implement NPSPAC's recommendations in Part 90 of our Rules, and we are reserving those frequencies identified by the *Final Report* as mutual aid channels. Any region may reserve additional channels for intercommunication if it finds a need for more such channels.

31. The *Notice* proposed to require manufacturers to include interoperability channels in all equipment using the new 800 MHz channels. *Notice*, 2 FCC Rcd at 2870, para. 13. Several commenters opposed this requirement, arguing that it would increase the cost of equipment and that some small agencies have no interoperability requirements. *See , e. g.*, Comments of New York City Police Department at 2; Comments of the Chicago Police Department at 4. Most commenters, however, favored the proposal. They maintained that the purpose and usefulness of the channels would be undermined if some agencies were to use equipment incapable of intercommunication. *See , e. g.*, Comments of Los Angeles Sheriff's Department at 4; Comments of John Powell at 3.

32. We are satisfied that the proposed requirement will not affect equipment costs appreciably. Equipment is already available in the existing 800 MHz private land mobile band that is programmable over a range of frequencies at little or no cost premium. We agree with

the majority of commenters that the intercommunication channels would be of little value unless all equipment had this capability. While some agencies may not anticipate the need for intercommunication by radio, we expect that the intercommunication channels will serve as a vital link in disasters and major emergencies.[20] In light of the minimal costs and great potential benefits, we find it in the public interest to adopt this requirement as proposed.[21]

33. The *Notice* also proposed to give all public safety licensees blanket authority to operate on any designated intercommunication channel. *Notice*, 2 FCC Rcd at 2870, para. 13. Nearly all of the commenters with an opinion on this matter opposed the Commission's recommendation. APCO stated that the "adoption of the proposal without a prerequisite of coordination of base and control transmitter locations would defeat Regional Planning efforts." Comments of APCO at 9. The Los Angeles Sheriff's Department agreed with APCO and further asserted that only licensees in local government, police, fire, highway maintenance, and forestry-conservation radio services should be afforded blanket authority. Comments of the Los Angeles Sheriff's Department at 4. Finally, DuPage Public Safety Communications (Du-Comm) stated that "the proposed 'Blanket Authorization' is a concern since in Illinois [they] have had an experience with this on a VHF frequency that has rendered the channel unusable most of the time when it is needed." Comments of Du-Comm at 3.

34. We are sympathetic to the concerns of the commenters as to the interference potential of base and control stations because of their relatively higher power and antenna heights compared to mobile and portable stations. Base and control transmitters, therefore, must be individually licensed and may operate only at those specific locations designated in the regional plans. We shall, however, permit all entities operating in accordance with an approved regional plan to operate mobile and portable equipment on the interoperability channels, in accordance with the provisions of paragraph 30.

3. ***Trunking***

35. The *Notice* proposed that regional plans incorporate trunking or equivalent spectrally efficient technology, where local demands are heavy, and solicited comment on that issue. *Notice*, 2 FCC Rcd at 2871, para. 16. In response, NPSPAC's *Final Report* recommended that any licensee requesting more than four channels be required to adopt trunking technology unless the licensee can demonstrate that its proposed system is of comparable efficiency to a trunked system or that a trunked system will not meet operational requirements. *Final Report* at 20.

36. Most commenters agreed that trunking should be encouraged as a means of improving spectrum efficiency, but argued that it should not be mandated at the national level. For example, the Southern California Regional Communications Planning Committee (Planning Committee) supported the position that trunking be required where channel requirements are heavy, but indicated that for some applications trunking might not satisfy operational requirements. Comments of Planning Committee at 3. The Planning Committee recommends that, in situations where it can be demonstrated that trunking would be detrimental, agencies should not be forced to develop and operate trunked systems. *Id.* at 4.

37. NPSPAC's recommendation strikes a reasonable balance between the need to implement spectrum efficient technology and the need to consider the limited resources of small users. Therefore, we conclude that smaller entities may use conventional systems of four channels or less. Entities requiring greater capacity, however, should establish trunked systems or, alternatively, share trunked systems with other users. Implementation of trunking is important not only to ensure that near-term use is accommodated, but also to provide for growth and preserve opportunities for other potential services. Accordingly, we are amending Part 90 of our Rules to require trunking for licensees requiring more than four channels, consistent with NPSPAC's recommendation. Exceptions will be permitted only when a substantial showing is made that alternative technology would be at least as efficient as trunking or that trunking would not meet operational requirements. Exceptions, will not be granted routinely, however, and strong evidence showing why trunking is unacceptable must be presented in support of any request for exception. We will require that the regional plans explain their criteria for exemption. We also require that applications for licensing of conventional channels contain a certification by the coordinator that they conform with the regional plans.

38. We are aware that several different types of trunked systems are available and are not compatible. The *Notice* did not propose standards for trunked systems. NPSPAC does not recommend adoption of a standard. It suggests, however, that such systems be based on use of a standard queuing theory. *Final Report* at 21. We believe that the performance of a trunked system, including queuing method, is best left to the discretion of each individual licensee. Establishing a standard by Commission order might well limit technological improvement in this area. Accordingly, we are not adopting trunking performance standards. All trunked systems will be required, however, to operate in a conventional and compatible mode on the intercommunication channels. These channels will thus provide a common interface between different types of trunked systems.

4. ***Loading***

39. The *Notice* proposed that the loading standards for the existing 800 MHz band be applied to the new public safety channels. Mutual aid channels would not be considered when determining system loading. *Notice*, 2 FCC Rcd at 2871, para. 20. That is, conventional systems would be required to load to 70 mobiles per channel and trunked systems to 100 mobiles per channel.[22] NPSPAC recommended that the Commission adopt a more flexible approach to loading for public safety systems. In particular, NPSPAC noted that the spectrum efficiency of a trunked system depends on such things as the number of channels, average length of communications, and type of queuing used by the system. NPSPAC argued that each type of public safety system presents a different challenge with respect to system engineering, and, therefore, loading standards should be developed separately for each such system. In making this determination, NPSPAC continued, the Commission should consider channel blocking and establish a guideline as to acceptable blocking percentages. NPSPAC did not, however, offer any proposals as to blocking percentages or loading standards. *See Final Report* at 20-21.

40. We find that efficient use of the public safety spectrum requires application of loading standards. We have no basis on which to apply a standard different from the standard for existing public safety services authorized in the 800 MHz band. We shall, therefore, apply the existing loading standards for the 800 MHz band to the new public safety channels. We also find, however, that some flexibility to accommodate different perceived public safety needs is desirable. We shall, therefore, waive our loading standards when a compelling case for waiver is made.

IV. IMPLEMENTATION OF THE PLAN

A. *Regional Boundaries*

41. In the *Notice*, the Commission asked NPSPAC to recommend specific regional boundaries. *Notice*, 2 FCC Rcd at 2870, para. 8. In its *Final Report*, NPSPAC recommended that the country be divided into fifty-four regions.[23] NPSPAC developed these regions by consensus, taking into account experience in coordination and administration of public safety operations, and the size of the regions to be administered. *See Final Report* at 26-27.[24] NPSPAC noted that it may be necessary in the future to modify regions, but suggested that no region should be smaller than a Primary Metropolitan Statistical Area.

42. The comments generally supported the regions proposed by NPSPAC, and we are adopting them largely as proposed.[25] Although fewer regions might offer some benefits in encouraging uniformity and broader coordination, the complexity of the planning process in each region would greatly increase with the size of the region. Further, increasing the size of regions would multiply the number of political jurisdictions included in each region, which could greatly slow the planning process and reduce the responsiveness of that process to unique local needs and characteristics. Moreover, the reduced responsiveness to local needs inherent in planning for larger regions could be expected to increase the number of waiver requests to the Commission regarding regional plans. Resolving these requests would not only burden Commission staff resources but would also require substantial Commission involvement in local public safety planning matters that would better be resolved locally. In light of these considerations and the fact that NPSPAC's proposal seems to have the support of the public safety community, we adopt NPSPAC's proposal as to regional boundaries with minor modifications and clarifications.

43. The Committee did not delineate specific boundaries for those proposed regions that include parts of one or more states. Therefore, we have developed and set forth boundaries for those regions that do not coincide with state boundaries. For Texas, in which NPSPAC proposed six regions, we have created a single region. While we recognize that the six regions proposed by NPSPAC have distinct characteristics, the single Texas region may, if it wishes, create sub-regions, define boundaries for those sub-regions, and develop its plan accordingly. Further, while NPSPAC has proposed interstate regions consisting of parts of Illinois, Indiana, Michigan, and Wisconsin, we believe that public safety requirements in border areas of these states can best be satisfied through cooperative efforts of the regional planning committees in these states. We shall not, therefore, establish interstate regions in that area as proposed by NPSPAC. Our primary considerations in defining regions are: (1) to define regions so there is no ambiguity regarding the area included; and (2) to include all the land area of the United States, including Puerto Rico and the Virgin Islands. The regions that we are, by this Order, establishing are listed in Appendix B to this *Report and Order*.

44. We shall consider changes to the regional boundaries, provided the Regional Planning Chairmen in the affected regions agree to the changes. *See* para. 48, *infra*. Two or more regions may consolidate into one region. region may develop subregions for planning purposes, but the region may submit only one regional plan. Any proposals for alterations to regional boundaries must be approved by this Commission.[26]

B. *Development of Regional Plans*

45. The Commission has adopted the regional boundaries listed in Appendix B to minimize potential inter-regional conflicts. Some metropolitan areas have been established as independent regions. There are many other metropolitan areas throughout the country, however, that overlap regional boundaries. These regions will have to work together to coordinate their respective regional plans, particularly as they affect these metropolitan areas. We recognize that many diverse interests will have to be reconciled in any negotiations between adjacent regions. Compromises may have to be made before regional plans can be drafted that adequately respond to all the public safety and special emergency communication requirements in the areas involved. We are confident, however, that the regional planning committees can develop effective procedures to resolve any inter-regional coordination problems.

46. We envision a process whereby the regional plans will be developed by regional planning committees, as proposed by NPSPAC. NPSPAC suggested, however, that these committees be comprised only of governmental entities to avoid complicating the planning process. *Final Report* at 24-30. [27] In order to meet public safety communications needs as effectively as possible, however, we believe that broad participation in the planning process is critical. We conclude, therefore, that membership on these committees must be open to representatives from all eligible user groups, including governmental and non-governmental entities. Only in this way can we assure that the needs of all potential spectrum users will be considered.

47. The Associated Public-Safety Communications Officers, Inc. (APCO), acting under its frequency coordination responsibilities, will be responsible for convening a meeting to initiate the planning process in each region.[28] For each region, APCO should appoint a local convenor who will be responsible for organizing and publicizing the first planning meeting. We request that APCO provide the Chief, Private Radio Bureau with a list of the convenors and their addresses within 45 days of the release date of this *Report and Order*. The convenor should set a date for the initial planning meeting, allowing at least 60 days for appropriate public notifications. Parties interested in participating in the regional planning process should contact the appropriate convenor. Officials responsible for National Security and Emergency Preparedness within the region should be notified of the initial planning meeting and invited to participate.

48. At the first meeting, a Regional Chairman must be elected from among the membership. Once a Chairman has been elected, APCO should certify the name to the Chief, Private Radio Bureau. The Committee should pro-

mptly adopt operating procedures to govern its operations. These procedures must ensure that all entities will be treated fairly in the planning process.

49. In developing their regional plans, the committees should take into account the National Plan criteria, local needs, and inter-regional considerations. Once the plan for a region has been finalized, an original and five copies of the plan should be forwarded by the Regional Planning Chairman to the Secretary, Federal Communications Commission, Washington, D.C. 20554.

C. *Contents of Regional Plans*

50. Our *Notice* discussed the types of information to be included in the regional plans. The *Notice* proposed that the regional plans indicate that the needs of all public safety users in the region have been considered. Further, the *Notice* proposed that the regional plans include spectrum utilization plans that take into account local needs and attempt to maximize spectrum efficiency through application of technologies such as trunking and through good engineering practice, such as limiting radiated power to that necessary to cover service areas. *Notice*, 2 FCC Rcd at 2870, para. 10. NPSPAC and the commenters support this proposal. *See , e. g., Final Report* at 20-21; Comments of Regents of University of California at 10-11.

51. We have carefully reviewed the comments and have considered the elements that all regional plans should include. We have concluded that all regional plans must include the following information: (1) a cover page that clearly identifies it as the regional plan for the defined region; (2) the name of the Regional Planning Chairman, including mailing address and telephone number; (3) the names of the members of the regional planning committee, including organizational affiliations, mailing addresses and telephone numbers; (4) a summary of the major elements of the plan; (5) a general description of how the spectrum is to be allotted among the various eligible users within the region; (6) an explanation of how the requirements of all eligible entities within the region were considered and met to the degree possible; (7) an explanation as to how eligible entities have been prioritized in areas where not all can receive licenses; (8) an explanation of how the plan has been coordinated with adjacent regions; (9) a detailed description of how the plan puts the spectrum to the best possible use by requiring system design with minimum coverage areas, by assigning frequencies so that maximum frequency reuse and offset channel use may be made, by using trunking, and by requiring small entities with minimal requirements to join together on a single system where possible;[29] and (10) the signature of the Regional Planning Chairman.[30]

52. The regional plans must also address operational issues. For example, each plan must explain how the interoperability channels are to be managed within the region. In addition, each plan should describe the provisions that have been made to ensure that these channels will work and be managed effectively across regional boundaries.

D. *Review of the Regional Plans*

53. In the *Notice*, we proposed that the regional plans be submitted to the Commission for review and that no assignments be made in a region until the plan for that region has been accepted by the Commission. *Notice*, 2 FCC Rcd at 2870, para. 8. We also solicited comment on criteria that should be used to evaluate regional plans. *Id.* at para. 9. Comments submitted generally supported the concept of public review and comment on each regional plan after submission to the Commission. *See , e. g.*, Comments of County of Riverside at 2; Comments of SIRSA at 6. Commenters also indicated that they expected the Commission to review the regional plans for conformance with the National Plan prior to approving them and authorizing use of the new spectrum. *See , e. g.*, Comments of City of Peoria at 10; Comments of California Public Safety Radio Association at 2-3. The NPSPAC *Final Report* recommended that the Commission solicit public comment on each regional plan for thirty days, review the comments, and either approve the plan as submitted or return the plan to the regional planning committee with reasons for rejection of the plan. *Final Report* at 30.

54. We agree with the commenters and NPSPAC that placing regional plans on public notice and soliciting comments are desirable. Accordingly, we shall give public notice of the regional plans as we receive them. Interested parties will be given thirty days to comment and fifteen days to reply to any comments filed.

55. During the review process, the Commission will consider the plans and the comments and replies, giving due deference to the need to allow the regional plans to accommodate regional differences. The Commission will examine the plans to ensure that public safety needs have been fully addressed and met to the degree possible, that the spectrum has been used efficiently, that coordination with adjacent regions has occurred, and that all requirements of the National Plan (as defined by paragraphs 11 through 40 of this document) have been met. The Private Radio Bureau and the Office of Engineering and Technology, on authority delegated by this Commission, will either accept the regional plan by issuing an order to that effect, or return the plan to the Regional Planning Chairman with reasons for rejection.

56. The *Final Report* also recommends the establishment of a Regional Plan Review Committee (RPRC), consisting of one representative from each region to provide guidance and assistance in developing regional plans, to mediate inter-regional resolution of problems that may arise, and to consider modifications to regional plans that may be necessary to satisfy future operational requirements. *Final Report* at 32. NPSPAC recommends that the RPRC meet once a year to monitor the progress of the regional planning process, consider any proposed changes, and send its recommendations to the Commission. We believe such a committee could provide valuable assistance to the public safety community during the planning process, particularly when modifications to regional plans become necessary to satisfy new operational requirements. The public safety community is free to establish such a committee if it wishes.

E. *Modification of Regional Plans*

57. NPSPAC points out that modification of the regional plans may be necessary after approval. *Final Report* at 56. APCO, acting in its frequency coordination role, or the Regional Planning Chairman may recommend, in writing, changes to a regional plan. The Commission will give prompt public notice soliciting comment on any such proposals and issue appropriate orders upon review.

V. MISCELLANEOUS ISSUES

A. *Vacated and Unused Frequencies*

58. A primary objective of this proceeding is to promote efficient use of available public safety spectrum. *Notice*, 2 FCC Rcd at 2869, para. 4. To this end, in addition to the technical specifications we have established for spectrum utilization, we intend to provide incentives for public safety entities to utilize fully all their spectrum resources in a timely manner. We acknowledge the complexity of anticipating the communications requirements of diverse entities over an extended period of time. We are also sensitive to the delays inherent in budgetary cycles and replacement of embedded equipment. The public interest would not be served, however, by an indefinite "warehousing" of spectrum. Such an approach would be inconsistent with our actions in other proceedings aimed at satisfying the future needs of land mobile users. Our decision regarding the disposition of vacated and unused frequencies will allow adequate time for identification of public safety requirements but will also consider the need for additional spectrum by other land mobile users and services.

1. *Vacated Frequencies*

59. The *Notice* recognized that establishing a "backbone" public safety band at 800 MHz might result in a substantial migration from the lower frequency bands currently used by public safety entities. Consequently, we raised the issue of whether, and under what circumstances, we should require the release of channels in the lower frequency bands as a result of moving public safety radio systems to the new 800 MHz spectrum. *Notice*, 2 FCC Rcd at 2870, para. 11.

60. Allocation of the vacated lower-band frequencies was highly debated among the commenters. Most public safety entities indicated that lower-band frequencies would remain an important part of the regional planning process. They also agreed that criteria were necessary for determining when frequencies are available for reassignment. *See , e. g.*, Reply Comments of APCO at 14-15; Comments of County of Orange at 4. In joint comments, the International Association of Fire Chiefs (IAFC) and the International Municipal Signal Association (IMSA) expressed concern that we not require users to migrate to 800 MHz and relinquish their lower-band allocations. Joint Comments of IAFC/IMSA at 4-6. Conversely, non-public safety land mobile users stated that they too have a need for spectrum below 800 MHz and argued that public safety entities using the 800 MHz channels be required to demonstrate a compelling need for retention of their lower-band allocations. *See , e. g.*, Comments of SIRSA at 8-9; Comments of API at 8; Comments of Utilities Telecommunications Council at 8; Comments of Forest Industries Telecommunications at 3-4.

61. In response to our *Notice*, NPSPAC's *Final Report* observes that in heavily populated areas, all frequencies in lower bands would remain fully occupied.[31] Nonetheless, the *Final Report* recommends that public safety entities be required to surrender their vacated lower frequencies if the following three conditions are met: (1) the new system fully replaces the functions of the old one, (2) the licensee has no other communications requirements that could be met through use of the lower frequencies, and (3) the new system has operated satisfactorily for long enough to allow a smooth transition from former operations and to demonstrate its reliability. *Final Report* at 47-48. The *Final Report* further recommends that reassignment of vacated frequencies to public safety entities be accomplished on a regional level, and that non-public safety assignments be handled by the recognized frequency coordinators pursuant to our existing interservice sharing rules. *Final Report* at 53-56; *see* 47 C.F.R. § 90.176.

62. We do not see the need for public safety entities shifting their operations to the new 800 MHz spectrum to retain their lower band frequencies. The Commission has made a substantial new allocation of spectrum to meet present and foreseeable public safety needs. We expect that as licenses move to this new spectrum they will make every effort to give up their lower band frequencies so that others may use them.

2. *Unused 800 MHz Frequencies*

63. Our *Notice* proposed that the regional planning process be completed no later than five years after adoption of final rules in this proceeding. We further proposed that, at that time, any channels that have not been identified as needed to satisfy future public safety requirements would be considered for other uses. *Notice*, 2 FCC Rcd at 2871, para. 18.

64. The *Final Report* contended that five years is insufficient for identifying all public safety spectrum requirements and argued to maintain a twenty five year time period for implementation of the regional plans. *Final Report* at 53-56. At the same time, the *Final Report* recognized that the communications requirements of public safety entities could vary greatly from region to region. In those regions where the demand for additional spectrum exceeds or approximates availability, the *Final Report* projected that the release of unutilized spectrum will not prove to be an issue. *Id.* at 53.

65. To encourage efficient utilization of the new 800 MHz channels, the *Final Report* proposed that the burden be placed upon the individual regions to justify retention of the public safety spectrum. Specifically, the *Final Report* recommends that two years after our adoption of a National Plan, we notify the public of the regions that have approved plans or that have submitted plans for approval. The Commission would then set a three-year deadline for submission of additional regional plans. At the close of the three-year period, the *Final Report* further recommends that the Commission institute a Rule Making proceeding aimed at reallocating fifty percent of the spectrum in geographic areas without regional plans. A second deadline would be established five years after the conclusion of the fifty percent reallocation proceeding, at which time an additional thirty percent of the spectrum would be reallocated. NPSPAC recommends that the remaining twenty percent of the spectrum be held in reserve for future public safety communications requirements that cannot be satisfied through technological advancements, considering all bands. Finally, NPSPAC concludes that any region that does not take advantage of the new 800 MHz allocation after the National Plan has been in place for twelve years is capable of meeting all public safety requirements for the 25-year planning period through existing 800 MHz and lower-band frequencies. *Final Report* at 54.

66. Most public safety entities agreed with NPSPAC's recommendation that the new 800 MHz channels be reserved for exclusive public safety use for a period sufficient to meet long-term public safety communications

requirements. *See* , *e. g.*, Reply Comments of County of Orange at 3-4. Moreover, there was a general consensus among public safety entities that any present discussion of reallocating unused 800 MHz frequencies is premature and unwarranted. *See* , *e. g.*, Comments of APCO at 14-15; Comments of City of Tulsa Police Department at 4. SIRSA recommended, however, that the 800 MHz channels be made available for general land mobile use after the adoption of regional plans. Comments of SIRSA at 8. API also requested that the new spectrum be made available to other land mobile users on a primary use basis five years after adoption of a National Plan. Comments of API at 8.

67. As the *Final Report* recognizes, this newly allocated spectrum might be under-utilized if regions fail to submit their plans promptly. *Final Report* at 53-55. It is also conceivable that a regional plan could be submitted that does not fully utilize the 800 MHz allocation, or that a region would submit a plan to reserve use of the frequencies, and then unreasonably delay implementation. We believe that the public interest dictates that plans for effective and efficient use of this spectrum be developed promptly. We expect that all regions will have filed regional plans within five years. We shall reassess the state of development of regional plans and the amount of unused spectrum after five years. If no plan has been submitted for a particular region, we shall move to open the spectrum for intercategory sharing in that region. Additionally, spectrum not identified for use in a region having a plan may be made available for intercategory sharing.

B. ***Use of Cellular and Mobile Satellite Services***

68. NASA and several mobile-satellite interests argued that the planned mobile-satellite service (MSS) and cellular radio service should be considered for satisfying part of public safety's communications requirements. They argued that MSS and cellular can provide intercommunication capability and that these technologies are spectrum efficient. Accordingly, they suggested that use of the mobile-satellite service and the cellular radio service be taken into account in developing the National Plan. *See* , *e. g.*, Comments of NASA at 6; MSS Joint Comments at 5. In response, several public safety agencies stated that MSS and cellular should not be considered in developing the National Plan. *See* , *e. g.*, Reply Comments of City of Dallas to *Final Report* at 1-2. They pointed out that while cellular has applications that are useful to public safety agencies, such as for general telephone service, cellular service cannot satisfy many public safety requirements. Specifically, they cited the inability to ensure an available communication channel in times of emergency, the time delay in dialing calls and the costs of cellular service. *Id.* With regard to MSS, they pointed out that the service is not now available and is not expected to be available for several years. Therefore, they stated that it is too soon to determine the future usefulness of MSS for public safety.

69. We recognize that the cellular radio service has applications that are useful to public safety agencies. Cellular systems as they currently exist, however, are designed to provide telephone service and do not provide the features required by public safety for dealing with emergency situations. Therefore, we agree that cellular service is currently not a substitute for dedicated public safety communications systems. Future technological improvements, however, may increase the usefulness of this service for public safety.

70. Regarding MSS, we expect that MSS will augment rather than supplant terrestrial public safety systems. MSS may be useful for providing intercommunications in remote areas or in unusual wide-area disaster situations. Such factors as lower cost, higher frequency reuse of terrestrial systems, and performance (*i. e.*, better communications reliability), however, are likely to lead to continued predominant use of conventional land mobile systems. Therefore, we believe that the needed interoperability can be achieved only among land-based systems. We nevertheless encourage regional planners to take into account the cellular radio service and the planned mobile-satellite service in satisfying public safety needs.

C. ***Federal Agency Concerns***

71. The National Telecommunications and Information Administration (NTIA), states that it and the other federal agencies, through the Interdepartment Radio Advisory Committee, have been closely following the Commission's development of a National Plan and have participated in NPSPAC's meetings. NTIA supports the regional planning process as a practical means of allowing local flexibility while providing nation-wide consistency. NTIA strongly supports establishment of interoperability channels to facilitate coordination among local, state and federal agencies. NTIA recommends that the Commission proceed with development of the National Plan but urges that the Commission obtain additional information as to interoperability requirements of local, state and federal agencies. NTIA Comments at 2-6. *See also* Comments of National Aeronautics and Space Administration (NASA) at 3. Further, both NTIA and the Federal Emergency Management Agency (FEMA) argue that the Commission should coordinate its development of a National Plan with FEMA and the National Communications System (NCS), which are responsible for developing a national security and emergency preparedness (NSEP) plan. NTIA Comments at 6-8; FEMA Comments at 2-5. FEMA questions whether the Commission's National Plan effort has complied with the spirit and direction of National Security Directive (NSDD)-47 and Executive Order 12472 regarding national security and emergency preparedness programs. FEMA Comments at 2-5.

72. APCO, in responding to the comments filed by NTIA, NASA and FEMA, states that it is clearly the Commission's statutory role, and not FEMA's, to allocate non-federal spectrum and to establish service rules and technical standards for the use of that spectrum. Reply Comments of APCO at 3. Further, APCO notes that the Commission's proceeding, as mandated by Congress, develops a plan for day-to-day operations for state and local governments, not a NSEP plan. APCO contends that everything NTIA suggests should be done is being done through the Commission's Rule Making process. APCO notes, however, that all public safety communications requirements and the need to plan for them will not be met in this one effort. It argues that planning for daily operational systems as well as national emergencies will require a continuing, comprehensive effort.

73. The Commission's effort to develop a National Plan was initiated in response to a Congressional directive dealing with spectrum availability for state and local public safety agencies. As NTIA notes, it and other federal agencies were invited to participate, and did participate, in that process.[32] We have carefully reviewed National Security Decision Directive (NSDD)-47 and Executive Order

12472. These documents clearly instruct FEMA and NCS to deal with disaster management and national emergencies. The documents do not discuss spectrum issues or the usual operations of state and local public safety agencies, which are the primary concerns of our National Plan.

74. NSDD-47 and Executive Order 12472 direct FEMA and NCS to accomplish their purposes by using to the maximum extent the existing facilities and resources of the federal government and, with their consent the facilities and resources of states, local political subdivisions, and other organizations and agencies. In the National Plan we are adopting here, we have established intercommunication channels that will be available to federal, state and local public safety entities. Therefore, we believe that our action here is compatible with and supportive of the directives to FEMA and NCS. Moreover, we have directed that agencies responsible for National Security and Emergency Preparedness be notified and invited to participate in the planning process. *See* para. 47, *supra*. We strongly encourage federal public safety and emergency preparedness agencies to participate in the regional planning process.

VI. FINAL REGULATORY FLEXIBILITY ANALYSIS

75. The Commission is adopting this *Report and Order* to implement a National Public Safety Plan and associated service rules to govern use of the 821-824/866-869 MHz bands in response to a directive from Congress to develop a plan to accommodate current and future spectrum requirements of public safety entities in this country. No comments were received that specifically addressed the Initial Regulatory Flexibility Analysis incorporated into our *Notice* pursuant to 5 U.S.C. § 603. This action will have a favorable impact on this nation's public safety and special emergency entities by providing them with additional spectrum resources with which to help satisfy their mobile communication requirements. Additionally, this action will benefit the general public by improving the overall quality and availability of critical safety of life and property services.

76. The only alternatives to this action suggested by the commenters were to employ cellular and mobile-satellite services to satisfy needs for intercommunication among public safety entities. As discussed above, these are not satisfactory alternatives. There are no other significant alternatives that would accomplish our stated objectives of developing technical standards for the 821-824/866-869 MHz band and developing and implementing a Public Safety National Plan.

VII. PAPERWORK REDUCTION ACT STATEMENT

77. The decisions contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found to impose a new information collection requirement on the public as a result of the creation of regional planning committees and the requirement that they prepare and submit to the Commission a regional plan. Implementation of new or modified requirements will be subject to approval by the Office of Management and Budget as prescribed by the Act.

VIII. ORDERING CLAUSES

78. Accordingly, IT IS ORDERED that, pursuant to the authority of Sections 4(i), 301 and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i), 301, and 303(r), Parts 0 and 90 of the Commission's Rules, 47 C.F.R. Parts 0 and 90, ARE AMENDED as set forth in Appendix C below.

79. IT IS FURTHER ORDERED that this Order will become effective **February 1, 1988.**

80. IT IS FURTHER ORDERED that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX A

Commenters to Notice of Proposed Rule Making and NPSPAC Initial Report

Albuquerque Police Department, New Mexico
American Hospital Association
American Petroleum Institute
Arcadia Police Department, California
Associated Public Safety Communication Officers, Inc.
Boston University Police Department
California Peace Officers Association
California Public-Safety Radio Association, Inc.
California Telecommunications Division
Chicago Police Department
Colton Police Department, California
Compton Police Department, California
Connecticut Bureau of Statewide Emergency Telecommunications
Connecticut Department of Public Safety
Culver City, California
Denver, Colorado, City and County
E. F. Johnson Company
El Cajon Police Department, California
Electronic Industries Association, Land Mobile Radio Section
Eugene Police, Fire & Emergency Services Department, Oregon
Federal Emergency Management Agency
Florida Division of Communications
Forest Industries Telecommunications
Fort Myers Police Department, Florida
General Electric Company
Glendora Police Department, California
Griffin, Frederick G., P.C.
Hawaii County Police Department
Honolulu Police Department, City and County

International Association of Fire Chiefs, Inc. (joint with IMSA)
International Municipal Signal Association (joint with IAFC)
Long Beach Police Department, California
Los Angeles, City of
Los Angeles County
Los Angeles County Sheriff
Los Angeles Fire Department
Los Angeles Police Department
Lynchburg Police Department, Virginia
MSS Joint Comments (Global Land Mobile Satellite Services, Hughes, McCaw, MCCA, Mobile Satellite Corp., and Skylink)
Maryland Office of Telecommunications Management
Maximum Service Telecasters, Association of
McCaw Communication Companies, Inc.
MicroControl Corporation
Milwaukee Police Department
Motorola, Inc.
Mountain States Telephone and Telegraph (joint with NW Bell Tel. & Pac. NW Bell)
National Aeronautics and Space Administration
National Telecommunications and Information Administration
New Jersey Emergency Response System Study Commission
New Jersey State Police New York Metropolitan Area Committee for Public Safety Spectrum Relief
New York City Police Department
Newport News Police Department, Virginia
North Central Texas Public Safety Communications Advisory Committee Northwestern Bell Telephone Co. (joint with Mountain States Tel. & Tel. & Pac. NW Bell)
Oakland Police Department, California
Orange County, California
Ozaukee County Sheriff's Department, Port Washington, Wisconsin Pacific Northwest Bell Telephone Co. (joint with Mountain States Tel. & Tel. & NW Bell)
Peoria, Illinois, City of Port Authority of New York and New Jersey (joint with NY Metro. Area Cmte.)
Powell, John S.
Redondo Beach Police Department, California
Riverside County, California, Department of Communications
San Jose Police Department, California
Seattle Police Department
South Carolina Southern Calif. Pub. Safety Regional Communications Planning Committee
Special Industrial Radio Service Association, Inc.
Teltron
Triton College Police Department, Illinois
Tulsa Police Department, Oklahoma
University of California Regents
University of Georgia Police Department
Utilities Telecommunications Council
Warren County Communications Department, Ohio
Weatherford Police Department, Texas
Winston-Salem Police Department, North Carolina

Reply Commenters to NPRM and NPSPAC Initial Report

Aeronautical Radio Inc. & Air Transport Association of America (joint)
American Hospital Association
Associated Public-Safety Communications Officers, Inc.
California Public-Safety Radio Association, Inc.
Dallas, City of
DuPage Public Safety Communications, Illinois
Electronic Industries Association, Land Mobile Radio Section
Forest Industries Telecommunications
General Electric Company
Los Angeles County
Los Angeles County Sheriff
Maximum Service Telecasters, Association of
Motorola, Inc.
New York Metropolitan Area Committee for Public Safety Spectrum Relief
North Central Texas Public Safety Communications Advisory Committee
Ohio State Highway Patrol
Orange County, California
Port Authority of New York and New Jersey (joint with NY Metro Area Cmte.)

Commenters to NPSPAC Final Report

American Petroleum Institute
Associated Public-Safety Communications Officers, Inc.
California Public-Safety Radio Association, Inc.
Culver City, California
Forest Industries Telecommunications
General Electric Company
International Association of Fire Chiefs, Inc. (joint with IMSA)
International Municipal Signal Association (joint with IAFC)
Los Angeles County
Maximum Service Telecasters, Association of
Mobile Satellite Service Applicants (Hughes, MCCA, McCaw, Mobile Satellite Corp., Skylink, Transit, North American Mobile Satellite, and Satellite Mobile Telephone Co.)
Omnicom, Inc.
New York Metropolitan Area Committee for Public Safety Spectrum Relief
Port Authority of New York and New Jersey (joint with NY Metro Cmte.)
Prince George's County Fire Department, Maryland
South Carolina
Special Industrial Radio Service Association, Inc.
Teltron

Reply Commenters to NPSPAC Final Report

American SMR Network Association, Inc.
Associated Public-Safety Communications Officers, Inc.
Dallas, City of
General Electric Company
Los Angeles County
Motorola, Inc.
New York Metropolitan Area Committee for Public Safety Spectrum Relief
North Central Texas Public Safety Communications Advisory Committee
Port Authority of New York and New Jersey (joint with NY Metro. Area Cmte.)

APPENDIX B
LIST OF REGIONS

1. ALABAMA
2. ALASKA
3. ARIZONA
4. ARKANSAS
5. CALIFORNIA-SOUTH (to the northernmost borders of San Luis Obispo, Kern, and San Bernardino Counties
6. CALIFORNIA-NORTH (that part of California not included in CALIFORNIA-SOUTH)
7. COLORADO
8. NEW YORK-METROPOLITAN (Fairfield County, CONNECTICUT; (Bronx, Kings, Nassau, New York, Orange, Putnam, Queens, Richmond, Rockland, Suffolk and Westchester Counties, NEW YORK; Bergen, Essex, Hudson, Morris, Passaic, Sussex and Union Counties, NEW JERSEY)
9. FLORIDA
10. GEORGIA
11. HAWAII
12. IDAHO
13. ILLINOIS
14. INDIANA
15. IOWA
16. KANSAS
17. KENTUCKY
18. LOUISIANA
19. MAINE; NEW HAMPSHIRE; VERMONT; MASSACHUSETTS; RHODE ISLAND; CONNECTICUT (except Fairfield County)
20. MARYLAND; WASHINGTON, D.C.; VIRGINIA-NORTHERN (Arlington, Fairfax, Fauquier, Loudoun, Prince William, and Stafford Counties, and Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park Cities)
21. MICHIGAN
22. MINNESOTA
23. MISSISSIPPI
24. MISSOURI
25. MONTANA
26. NEBRASKA
27. NEVADA
28. NEW JERSEY (except for counties included in NEW YORK-METROPOLITAN, Region 8, above); PENNSYLVANIA (Bucks, Chester, Montgomery, and Philadelphia Counties); DELAWARE
29. NEW MEXICO
30. NEW YORK (All except area in NEW YORK-METROPOLITAN, Region 8, above)
31. NORTH CAROLINA
32. NORTH DAKOTA
33. OHIO
34. OKLAHOMA
35. OREGON
36. PENNSYLVANIA (All except area in Region 28, above)
37. SOUTH CAROLINA
38. SOUTH DAKOTA
39. TENNESSEE
40. TEXAS
41. UTAH
42. VIRGINIA (All except for area in Region 20, above)
43. WASHINGTON
44. WEST VIRGINIA
45. WISCONSIN
46. WYOMING
47. PUERTO RICO
48. U.S. VIRGIN ISLANDS

APPENDIX C

A. ***Amendments to Part 0 of the Commission's Rules and Regulations***

1. The authority citation for Part 0 continues to read:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Implement; 5 U.S.C. 552, unless otherwise noted.

2. New Section 0.335 is added to read as follows:

§ 0.335 Authority delegated jointly to the Chief of the Private Radio Bureau and the Chief Engineer.

Authority is delegated jointly to the Chief of the Private Radio Bureau and the Chief Engineer to review and accept regional plans submitted and modifications thereto as required under the public safety National Plan adopted in General Docket 87-112.

B. ***Amendments to Part 90 of the Commission's Rules and Regulations***

3. The authority citation for Part 90 continues to read:

Authority: Secs. 4, 303, 48 Stat., as amended, 1066, 1082; 47 U.S.C. 154, 303.

4. New Section 90.16 is added to read as follows:

§ 90.16 Public Safety National Plan.

The Commission has established a National Plan which specifies special policies and procedures governing the Public Safety Radio Services and the Special Emergency Radio Service. The National Plan is contained in the *Report and Order* in General Docket No. 87-112. The principal spectrum resource for the National Plan is the 821-824 MHz and the 866-869 MHz bands. The National plan establishes planning regions covering all parts of the United States, Puerto Rico, and the U.S. Virgin Islands. No assignments will be made in the 821-824 MHz and 866-869 MHz bands until a regional plan for the area has been accepted by the Commission.

5. The frequency table in paragraph (b) of Section 90.17 is amended by revising frequency band "806-821" to read "806-824" and revising frequency band "851-866" to read "851-869".

6. Paragraph (c)(15) of Section 90.17 is revised to read:

* * * * *

(c) * * *

(15) Subparts M and S contain rules for assignment of frequencies in the 806-824 MHz and 851-869 MHz bands.

* * * * *

7. The frequency table in paragraph (d) of Section 90.19 is amended by revising frequency band "806-821" to read "806-824" and revising frequency band "851-866" to read "851-869".

8. Paragraph (e)(22) of Section 90.19 is revised to read:

* * * * *

(e) * * *

(22) Subparts M and S contain rules for assignment of frequencies in the 806-824 MHz and 851-869 MHz bands.

* * * * *

9. The frequency table in paragraph (b) of Section 90.21 is amended by revising frequency band "806-821" to read "806-824" and revising frequency band "851-866" to read "851-869".

10. Paragraph (c)(10) of Section 90.21 is revised to read:

* * * * *

(c) * * *

(10) Subparts M and S contain rules for assignment of frequencies in the 806-824 MHz and 851-869 MHz bands.

* * * * *

11. The frequency table in paragraph (b) of Section 90.23 is amended by revising frequency band "806-821" to read "806-824" and revising frequency band "851-866" to read "851-869".

12. Paragraph (c)(10) of Section 90.23 is revised to read:

* * * * *

(c) * * *

(10) Subparts M and S contain rules for assignment of frequencies in the 806-824 MHz and 851-869 MHz bands.

* * * * *

13. The frequency table in paragraph (b) of Section 90.25 is amended by revising frequency band "806-821" to read "806-824" and revising frequency band "851-866" to read "851-869".

14. Paragraph (c)(16) of Section 90.25 is revised to read:

* * * * *

(c) * * *

(16) Subparts M and S contain rules for assignment of frequencies in the 806-824 MHz and 851-869 MHz bands.

* * * * *

15. New Section 90.34 is added to read as follows:

§ 90.34 Public Safety National Plan.

The Commission has established a National Plan which specifies special policies and procedures governing the Public Safety Radio Services and the Special Emergency Radio Service. The National Plan is contained in the *Report and Order* in General Docket No. 87-112. The principal spectrum resource for the National Plan is the 821-824 MHz and the 866-869 MHz bands. The National plan establishes planning regions covering all parts of the United States, Puerto Rico, and the U.S. Virgin Islands. No assignments will be made in the 821-824 MHz and 866-869 MHz bands until a regional plan for the area has been accepted by the Commission.

16. The frequency table in paragraph (a) of Section 90.53 is amended by revising frequency band "806-821" to read "806-824" and revising frequency band "851-866" to read "851-869".

17. Paragraph (b)(21) of Section 90.53 is revised to read:

* * * * *

(b) * * *

(21) Subparts M and S contain rules for assignment of frequencies in the 806-824 MHz and 851-869 MHz bands.

* * * * *

18. Section 90.175 is amended by revising paragraph (b) to read as follows:

§ 90.175 Frequency coordination requirements.

* * * * *

(b) For frequencies between 470 and 512 MHz, 806-824/851-869 MHz, and 896- 901/935-940 MHz: A statement from the applicable coordinator recommending specific frequencies that are available for assignment in accordance with the loading standards and mileage separations applicable to the specific radio service or category of user involved.

* * * * *

19. Section 90.203 is amended by adding a new paragraph (i) to read as follows:

§ 90.203 Type Acceptance Required.

* * * * *

(i) Equipment type accepted after February 16, 1988 and marketed for public safety operation in the 821-824/866-869 MHz bands must have the capability to be programmed for operation on the mutual aid channels as designated in § 90.617(a) of the Rules.

20. The frequency table in paragraph (b) of Section 90.205 is amended by revising frequency band "806 to 821" to read "806 to 824" and revising frequency band "851 to 866" to read "851 to 869".

21. Section 90.209 is amended by revising paragraph (b)(4), by redesignating existing paragraphs (i) and (j) as new paragraphs (j) and (k), respectively, and by adding a new paragraph (i) to read as follows:

§ 90.209 Bandwidth Limitations.

* * * * *

(b) * * *

(4) For all F3E or G3E emissions on frequencies below 947 MHz, except for the frequency bands 896 to 901 MHz and 935 to 940 MHz, maximum authorized bandwidth shall be 20 kHz. Except for frequencies in the 821-824 and 866- 869 MHz bands, the maximum authorized frequency deviation shall be 5 kHz. For frequencies in the 821-824 and 866-869 MHz bands the maximum authorized frequency deviation shall be 4 kHz. Stations authorized for operation on or before December 1, 1961, in the frequency band 73.0-74.6 MHz may continue to operate with a bandwidth of 40 kHz and a deviation of 15 kHz. For stations operating on frequencies above 947 MHz, except as provided in paragraph (b)(5) of this section, the maximum authorized bandwidth and frequency deviation will be specified in the station authorization.

* * * * *

(i) For transmitters that operate in the frequency bands 821-824 and 866-869 MHz that are not equipped with an audio low-pass filter in accordance with the provisions of 90.211(d)(1), the power of any emission shall be attenuated below the unmodulated carrier power (P) in accordance with the following schedule:

(1) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (fd in kHz) of 4 kHz or less: 0 dB.

(2) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (fd in kHz) of more than 4 kHz up to and including 8.5 kHz: At least 107 log10(fd/4).

(3) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (fd in kHz) of more than 8.5 kHz up to and including 15 kHz: At least 40.5 log10(fd/1.16).

(4) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (fd in kHz) of more than 15 kHz up to and including 25 kHz: At least 116 log10(fd/6.1).

(5) On any frequency removed from the center of the authorized bandwidth by more than 25 kHz: At least 43 + log10(output power in watts), or 80 dB, whichever is lesser attenuation.

* * * * *

22. Section 90.211(d) is amended by revising the introductory text and paragraph (d)(1)(ii), and by amending paragraph (d)(2) by changing the reference to "(i)" to read "(j)" in the two places in which it appears to read as follows:

§ 90.211 Modulation Requirements.

* * * * *

(d) Each transmitter shall meet the requirements provided in paragraph (d)(1) or (2) of this section. The requirements of this paragraph do not apply to mobile stations that are authorized to operate with a maximum power output of 2 watts or less or to any radiotelecommunication system operating wholly within the limits of one or more of the territories or possessions of the United States, or Alaska, or Hawaii, except those systems operating in the frequency ranges 806 to 824 MHz, 851 to 869 MHz, 896 to 901 MHz, and 935 to 940 MHz.

(1) * * *

(i) * * *

(ii) For transmitters that operate in the frequency band of 450 to 470 MHz and that are authorized on or after November 1, 1967, and transmitters that operate in the frequency bands of 470 to 512 MHz, 806 to 824 MHz, 851 to 869 MHz, 929 to 930 MHz, and Traveler's Information Stations on 530 and 1610 kHz, the attenuation of the low-pass filter between the frequencies of 3 kHz and 20 kHz shall be greater than the attenuation at 1 kHz by at least: 60 Log10 (f/3) decibels where "f" is the frequency in kHz. At frequencies above 20 kHz, the attenuation shall be 50 decibels greater than the attenuation at 1 kHz.

* * * * *

23. Section 90.213 is amended by inserting two lines in numerical order in the Table following paragraph (a) as follows: Section 90.213 Frequency tolerance.

(a) * * *

Frequency Tolerance

Fixed and base stations			Mobile stations	
Frequency range (MHz)	200 W Over output power	200 W or less output power	Over 2 W output power	2 W or less output power
		* * * * *		
821 to 824	.0001[11]	.0001[11]	.00015	.00015
		* * * * *		
866 to 869	.0001	.0001	.00015	.00015
		* * * * *		

[11] Control stations may operate with the frequency tolerance specified for associated mobile stations.

* * * * *

24. Section 90.477 is amended by revising paragraph (b) to read as follows:

§ 90.477 Interconnected Systems.

* * * * *

(b) In the frequency ranges 806-824 MHz, 851-869 MHz, 896-901 MHz, and 935- 940 MHz, interconnection with the public switched telephone network is authorized under the following conditions:

* * * * *

25. Section 90.492 is revised to read as follows:

§ 90.492 One Way Paging Operations in the 806-824 MHz, 866-869 MHz, 896-901 MHz and 935-940 MHz Bands.

Paging operations are permitted in the 806-824, 851-869, 896-901, and 935-940 MHz bands only in accordance with §§ 90.378 and 90.645(e) and (h).

26. The heading for Part 90, Subpart S, of the Rules and Regulations is revised to read as follows:

Subpart S - Regulations Governing Licensing and Use of Frequencies in the 806-824, 851-869, 896-901, and 935-940 MHz bands.

27. Section 90.601 is revised to read as follows:

§ 90.601 Scope.

This subpart sets out the regulations governing the licensing and operations of all conventional systems operating in the 806-824/851-869 MHz and 896-901/935- 940 MHz bands, and trunked systems operating in the 809.750-816/854.750-861 MHz, 821-824/866-869 MHz, and 896-901/935-940 MHz bands. Trunked systems operating in the 816-821/861-866 MHz bands are governed by the rules in Subpart M until action is taken by the Commission to merge Subpart M with Subpart S. This subpart also governs the use of frequencies in the 806-821/851-866 MHz bands along the Mexican and Canadian border areas in accordance with existing agreements. It includes eligibility requirements, applications procedures, operational and technical standards for stations licensed in these bands. The rules in this subpart are to be read in conjunction with the applicable requirements contained elsewhere in this part; however, in case of conflict, the provisions of this subpart shall govern with respect to licensing and operation in these frequency bands.

28. Section 90.603 is amended by revising the introductory text to read as follows:

§ 90.603 Eligibility.

The following persons are eligible for licensing in the 806-824 MHz, 851-869 MHz, 896-901 MHz, and 935-940 MHz Bands.

* * * * *

29. The heading immediately preceding Section 90.611 is revised to read as follows:

Policies Governing the Processing of Applications and the Selection and Assignment of Frequencies for Use in the 806-824 MHz, 851-869 MHz, 896-901 MHz, and 935-940 MHz Bands.

30. Section 90.613 is amended by revising the introductory text, and amending the "Table of 806-821/851-866 MHz Channel Designations" by revising the entry for channels 1 and 600 and by adding new channels 601 to 830 to read as follows:

§ 90.613 Frequencies Available.

The following table indicates the channel designations of frequencies available for assignment to eligible applicants under this subpart. Frequencies shall be assigned in pairs, with mobile and control station frequencies taken from the 806-824 MHz band with corresponding base station frequencies being 45 MHz higher and taken from the 851-869 MHz band, or with mobile and control station frequencies taken from the 896-901 MHz band with corresponding base station frequencies being 39 MHz higher and taken from the 935-940 MHz band. Only the upper half of each frequency pair is listed in the table.

Table of 806-824/851-869 MHz Channel Designations:

Channel No.	Base Frequency (MHz)
1	851.0125

* * * * *

600	865.9875
601	866.0125
602	.0375
603	.0500
604	.0625
605	.0750
606	.0875
607	.1000
608	.1125
609	.1250
610	.1375
611	.1500
612	.1625
613	.1750
614	.1875
615	.2000
616	.2125
617	.2250
618	.2375
619	.2500
620	.2625
621	.2750
622	.2875
623	.3000
624	.3125
625	.3250
626	.3375
627	.3500
628	.3625
629	.3750
630	.3875
631	.4000
632	.4125
633	.4250
634	.4375
635	.4500
636	.4625
637	.4750
638	.4875
639	.5125
640	.5375
641	.5500
642	.5625
643	.5750
644	.5875
645	.6000
646	.6125
647	.6250
648	.6375
649	.6500
650	.6625
651	.6750
652	.6875
653	.7000
654	.7125
655	.7250
656	.7375
657	.7500
658	.7625
659	.7750
660	.7875
661	.8000
662	.8125
663	.8250
664	.8375
665	.8500
666	.8625
667	.8750
668	.8875
669	.9000
670	.9125
671	.9250
672	.9375
673	.9500
674	.9625
675	.9750
676	.9875
677	867.0125
678	.0375
679	.0500
680	.0625
681	.0750
682	.0875
683	.1000
684	.1125
685	.1250
686	.1375
687	.1500
688	.1625
689	.1750
690	.1875
691	.2000
692	.2125
693	.2250
694	.2375
695	.2500
696	.2625
697	.2750

698	.2875
699	.3000
700	.3125
701	.3250
702	.3375
703	.3500
704	.3625
705	.3750
706	.3875
707	.4000
708	.4125
709	.4250
710	.4375
711	.4500
712	.4625
713	.4750
714	.4875
715	.5125
716	.5375
717	.5500
718	.5625
719	.5750
720	.5875
721	.6000
722	.6125
723	.6250
724	.6375
725	.6500
726	.6625
727	.6750
728	.6875
729	.7000
730	.7125
731	.7250
732	.7375
733	.7500
734	.7625
735	.7750
736	.7875
737	.8000
738	.8125
739	.8250
740	.8375
741	.8500
742	.8625
743	.8750
744	.8875
745	.9000
746	.9125
747	.9250
748	.9375
749	.9500
750	.9625
751	.9750
752	.9875
753	868.0125
754	.0375
755	.0500
756	.0625
757	.0750
758	.0875
759	.1000
760	.1125
761	.1250
762	.1375
763	.1500
764	.1625
765	.1750
766	.1875
767	.2000
768	.2125
769	.2250
770	.2375
771	.2500
772	.2625
773	.2750
774	.2875
775	.3000
776	.3125
777	.3250
778	.3375
779	.3500
780	.3625
781	.3750
782	.3875
783	.4000
784	.4125
785	.4250
786	.4375
787	.4500
788	.4625
789	.4750
790	.4875
791	.5000
792	.5125
793	.5250
794	.5375
795	.5500
796	.5625
797	.5750
798	.5875
799	.6000
800	.6125
801	.6250
802	.6375
803	.6500
804	.6625
805	.6750
806	.6875
807	.7000
808	.7125
809	.7250
810	.7375
811	.7500
812	.7625
813	.7750
814	.7875
815	.8000
816	.8125
817	.8250
818	.8375
819	.8500
820	.8625
821	.8750
822	.8875
823	.9000
824	.9125
825	.9250
826	.9375
827	.9500
828	.9625
829	.9725
830	.9875

* * * * *

31. Section 90.617 is amended by revising the heading, paragraph (a), and the heading of Table 1 following paragraph (a); and by adding new paragraph (a)(1) immediately following Table 1 to read as follows:

§ 90.617 Frequencies in the 809.750-816/854.750-861 MHz, 821-824/866-869 MHz, and 896-901/935-940 MHz Bands Available for Trunked or Conventional System Use in Non-border Areas.

(a) The channels listed in Table 1 and paragraph (a)(1) are available to eligible applicants in the Public Safety Category which consists of the Local Government, Police, Fire, Highway Maintenance, Forestry Conservation, and Special Emergency Radio Services. These frequencies are available in areas farther than 110 km (68.4 miles) from the U.S./Mexican border, and 140 km (87 miles) from the U.S./Canadian border. Specialized Mobile Radio Systems will not be authorized in this category. These channels are available for intercategory sharing as indicated in § 90.621(g).

Public Safety Category

Table 1: 806-821/851-866 MHz Band Channels (70 Channels)

* * * * *

(1) Channels numbers 601-830 are also available to eligible applicants in the Public Safety Category in areas farther than 110 km (68.4 miles) from the U.S./Mexican border, and 140 km (87 miles) from the U.S./Canadian border. The assignment of these channels will be done in accordance with the policies defined in the *Report and Order* of Gen. Docket No. 87-112 (*See* §§ 90.16 and 90.34). The following channels are available only for mutual aid purposes as defined in Gen. Docket No. 87-112: channels 601, 639, 677, 715, 762.

* * * * *

32. Section 90.621 is amended by revising paragraphs (c), (d), and (e); and by adding new paragraph (i) to read as follows:

§ 90.621 Selection and Assignment of Frequencies.

* * * * *

(c) Trunked systems authorized on frequencies in the Public Safety (except for those systems that have participated in a formal regional planning process as described in § 90.16), Industrial/Land Transportation, and Business Categories will be protected solely on the basis of predicted contours. Coordinators will attempt to provide a 40 dBu contour and to limit co-channel interference levels to 30 dBu over an applicant's requested service area. This would result in a mileage separation of 70 miles for typical system parameters. Separations will be less than 70 miles where the requested service areas, terrain, or other factors warrant reduction. In the event that the separation is less than 70 miles, the coordinator must indicate that the protection criteria have been preserved or that the affected licensees have agreed in writing to the proposed system. Only co-channel interference between base station operations will be taken into consideration. Adjacent channel and other types of possible interference will not be taken into account.

(d) Conventional systems authorized on frequencies in the Public Safety (except for those systems that have participated in a formal regional planning process as described in § 90.16), Industrial/Land Transportation, and Business Categories that have met the loading level necessary for channel exclusivity will be protected in the same fashion as described above in subparagraph (c).

(e) Conventional systems authorized on frequencies in the Public Safety (except for those systems that have participated in a formal regional planning process as described in § 90.16), Industrial/Land Transportation, and Business Categories that have not met the loading levels necessary for channel exclusivity will not be afforded co-channel protection.

* * * * *

i) Applications for Public Safety systems (both trunked and conventional) in the 821-824/866-869 MHz bands will be assigned and protected based on the criteria established in the appropriate regional plan. *See* § 90.16 and the *Report and Order* in General Docket 87-112.

33. The heading immediately preceding Section 90.635 is revised to read as follows:

Technical Regulations Regarding the Use of Frequencies in the 806-824 MHz, 851-869 MHz, 896-901 MHz, and 935-940 MHz bands.

34. Section 90.635 is amended by revising the titles of Tables 2, 3, and 4 to read as follows:

§ 90.635 Limitations on Power and Antenna Height.

* * * * *

Table 2--Equivalent Power and Antenna Heights for Base Stations in the 851-869 MHz, and 935-940 MHz Bands Which Have a Requirement for a 32 km (20 mi.) Service Area Radius.

* * * * *

Table 3--Equivalent Powers and Antenna Heights for Suburban-Conventional Base Stations in the 851-869 MHz, and 935-940 MHz Bands Which Have a Requirement for Less than 20-mi. Service Area Radius-Maximum Effective Radiated Power (Watts).

* * * * *

Table 4--Equivalent Powers and Antenna Heights for Urban-Conventional and Trunked System Base Stations in the 851-869 MHz and 935-940 MHz Bands Which Have a Requirement for Less Than 20-mi. Service Area Radius--Maximum Effective Radiated Power (Watts).

* * * * *

35. Section 90.637 is amended by revising paragraph (a) to read as follows:

§ 90.637 Restrictions on Operational-Fixed Stations.

(a) Except for control stations, operational-fixed operations will not be authorized in the 806-824 MHz, 851-869 MHz, 896-901 MHz, or 935-940 MHz bands. This does not preclude secondary fixed tone signalling and alarm operations authorized in § 90.235.

* * * * *

FOOTNOTES

[1] Report and Order, Gen. Docket Nos. 84-1231, 84-1233 and 84-1234, 2 FCC Rcd 1825 (1986) (*Allocation Order*), *recon. denied*, 2 FCC Rcd 2515 (1987) (licensing issues), Memorandum Opinion and Order, Gen Docket Nos. 84-1231, 84- 1233, and 84-1234 (adopted September 17, 1987) (allocation issues).

[2] Federal Communications Commission Authorization Act of 1983, Pub. L. No. 98-214, § 9(a), 97 Stat. 1467 (1983) (*Authorization Act*) (directing the Commission to establish a plan that ensures that public safety needs are taken into account in making allocations of the electromagnetic spectrum). In addition, the Conference Report on the Communications Amendments Act of 1982 expressed particular concern about "radio services which are necessary for the safety of life and property and [urged] the Commission to carefully consider the legitimate needs of public safety agencies in managing the private land mobile spectrum." H.R. Rep. No. 97-765, 97th Cong., 2d Sess. 52-53 (1982).

[3] Notice of Proposed Rule Making, Gen. Docket No. 87-112, 2 FCC Rcd 2869 (1987) (*Notice*).

[4] As used in this *Report and Order*, the term "public safety" is intended to include activities of licensees in the Public Safety Radio Services and in the Special Emergency Radio Service. *See* note 13, *infra*.

[5] Notice of Inquiry, Future Public Safety Telecommunications Requirements, PR Docket No. 84-232, 49 Fed. Reg. 9754, 9756-57 (March 15, 1984).

[6] Private Radio Bureau, FCC, Report on Future Public Safety Telecommunications Requirements, PR Docket No. 84-232 (August 1, 1985) (*Staff Report*), *released by* Order Regarding Staff Report, Future Public Safety Telecommunications Requirements, 50 Fed. Reg. 32239 (August 9, 1985).

[7] The Report pointed out that these frequencies would be extremely useful for public safety purposes because they are adjacent to existing public safety allocations. *Staff Report* at 108. Public safety authorities who commented on the *Notice* also advocated allocation of this portion of the spectrum for public safety use. *See Allocation Order*, 2 FCC Rcd at 1837, para. 90.

[8] *Id.* at 1837, para. 90. First Report and Order and Second Notice of Inquiry, Gen. Docket No. 18262, 35 Fed. Reg. 8644 (June 4, 1970).

[9] Charter of the National Public Safety Planning Advisory Committee, Section C, *published in* Appendix A, Notice of Proposed Rule Making, Gen. Docket No. 87-112, 2 FCC Rcd 2869, 2873 (1987).

[10] NPSPAC, Initial Report To The Federal Communications Commission, *published in* Appendix B, Notice of Proposed Rule Making, Gen. Docket No. 87-112, 2 FCC Rcd 2869, 2873-92 (1987) (*Initial Report*).

[11] Final Report of the National Public Safety Planning Advisory Committee to the Federal Communications Commission, Gen. Docket No. 87-112 (September 9, 1987) (*Final Report*). The NPSPAC membership adopted the *Final Report* unanimously.

[12] FCC, Public Notice, Comments Requested on Final Report of the National Public Safety Planning Advisory Committee, Report No. 4810 (September 11, 1987). *See* Appendix A of this Report and Order for a complete list of parties filing comments on the *Notice*, *Initial Report*, and *Final Report*.

[13] The Public Safety Radio Services include local governments, police and fire departments, and highway maintenance and forestry-conservation entities. 47 C.F.R. Part 90, Subpart B, §§ 90.15 - 90.25. The Special Emergency Radio Service (SERS) includes hospitals, clinics, physicians, rescue organizations, medical service agencies, veterinarians, handicapped persons, disaster relief organizations, school buses, beach patrols, and additional emergency services. 47 C.F.R. Part 90, Subpart C, §§ 90.33 - 90.55.

[14] Because 12.5 kHz is half the channel width traditionally used at 800 MHz, this plan is commonly referred to as the "split channel" plan.

[15] Specifically, NPSPAC recommended that the 821-824/866-869 MHz spectrum be authorized in 25 kHz bandwidth channels evenly spaced every 12.5 kHz, except that national common or mutual aid channels should have no 12.5 kHz adjacent frequency assignments; that equipment employing 25 kHz bandwidth be allowed on all channels, with 12.5 kHz adjacent systems being configured in an offset arrangment with due consideration given to both protection ratios and frequency reuse criteria; that there be no distinctions between the "primary and "offset" channels, such as power output and antenna height limitations (*i. e.*., no secondary use rules should be applied); that the enhanced 25 kHz bandwidth equipment be required for all users, but that future migration to more advanced technologies be neither required nor prohibited at this time; and that the above recommendations, insofar as they are applicable, be also implemented in the 806-821/851-866 MHz public safety allocation, with provisions for easing adverse impact on existing systems in the public safety "pool." *Final Report* at 17-18.

[16] *Final Report* at 16, *citing* Motorola C&E, Inc., Comparison of Spectrum Efficiency of 25 kHz Offset Channel and 12.5 kHz Split Channel Approaches to the 821-824 MHz Public Safety Spectrum (technical paper presented to Electronics Industries Ass'n, Land Mobile Section, July 24, 1987).

[17] NPSPAC recommends the following improvements to the existing equipment specifications:

a. Reduce deviation of all transmitters to 4.0 kHz;

b. Improve all mobile, portable and control transmitter frequency stability to .00015% and .0001% for base transmitters;

c. Improve the receiver selectivity so as to provide 20 dB of protection to the 12.5 kHz removed signal when tested in accordance with a revised method of measurement for voice modulation; and

d. For data, employ a "data mask" with the following attenuation characteristics:

0 to 4.0 kHz	0 dB
4 to 8.5 kHz	107 Log10 (f/4)
8.5 to 15.0 kHz	40.5 Log10 (f/1.16)
15.0 to 25.0 kHz	116 Log10 (f/6.1)
Greater than 25.0 kHz	43.0 Log10 (power output in watts), or 80 dB, whichever is the lesser attenuation

NPSPAC noted that these modifications were developed with the assistance and consensus of radio equipment manufacturers, consulting engineers and public safety agencies, utilizing field tests and bench tests. *Final Report* at 8.

[18] An inferior receiver would, of course, diminish a public safety organization's ability to receive communications and, thus, its ability to provide public safety services. We believe, however, that these organizations have incentives to use technologically adequate receivers.

[19] The specific national common channels recommended by NPSPAC are as follows:

CHANNEL	USE
1. 821.0125 (M) 866.0125 (B)	National Public Safety Calling Channel
2. 821.5125 (M) 866.5125 (B)	Tactical Channel
3. 822.0125 (M) 867.0125 (B)	Tactical Channel
4. 822.5125 (M) 867.5125 (B)	Tactical Channel
5. 823.0125 (M) 868.0125 (B)	Tactical Channel

Final Report at 6.

[20] We recognize that many agencies currently coordinate their activities by wireline or other arrangements. These existing arrangements, however, would not provide the same capabilities as the intercommunication channels we are establishing here. These channels will serve as a central network that all public safety entities participating in the National Plan will have in common.

[21] Equipment that is type accepted for operation in the 806-821/851-866 MHz bands may not be modified to operate in the newly allocated spectrum at 821- 824/866-869 MHz unless it is type accepted as conforming to the revised technical standards adopted herein. One exception to this policy will be permitted: equipment type accepted under Part 90 for operation in the 806-821/851-866 MHz band is considered type accepted for operation on the five mutual aid channels.

[22] 47 C.F.R. §§ 90.631 and 90.633.

[23] The regions recommended by NPSPAC are as follows:

1. Alabama; 2. Alaska; 3. Arizona; 4. Arkansas; 5. California (Northern); 6. California (Southern); 7. Colorado; 8. Connecticut (Western) - New York (Southern) - New Jersey (Northern); 9. Florida; 10. Georgia; 11. Hawaii; 12. Idaho; 13. Illinois; 14. Illinois (Northeastern) - Wisconsin (Southeastern) - Indiana (Northwestern) - Michigan (Southwestern); 15. Illinois (Northwestern) - Wisconsin (Southwestern); 16. Indiana; 17. Iowa; 18. Kansas; 19. Kentucky; 20. Louisiana; 21. Maine - New Hampshire - Vermont - Massachusetts - Rhode Island - Connecticut (Northern); 22. Maryland - Washington, D.C. - Virginia (Northern); 23. Michigan; 24. Minnesota; 25. Mississippi; 26. Missouri; 27. Montana; 28. Nebraska; 29. Nevada; 30. New Jersey (Southern) - Pennsylvania (Eastern) - Delaware; 31. New Mexico; 32. New York - Albany; 33. New York - Buffalo; 34. North Carolina; 35. North Dakota; 36. Ohio; 37. Oklahoma; 38. Oregon; 39. Pennsylvania; 40. South Carolina; 41. South Dakota; 42. Tennessee; 43. Texas - Austin; 44. Texas - Dallas/Forth Worth; 45. Texas - El Paso; 46. Texas - Houston; 47. Texas - Lubbock/Amarillo; 48. Texas - San Antonio; 49. Utah; 50. Virginia; 51. Washington; 52. West Virginia; 53. Wisconsin; and 54. Wyoming. *Final Report* at 28-29.

[24] As indicated in the *Notice*, in some areas such as Southern California, the New York Metropolitan area, and Dallas, local public safety groups have already formed to establish regional plans for public safety use of the radio spectrum in their immediate areas. *Notice*, 2 FCC Rcd at 2870, para. 7.

[25] *See , e. g.*, Comments of South Carolina at 2-3; Comments of Florida Division of Communications at 3.

[26] This issue may also, of course, be raised in a petition for reconsideration of this Order.

[27] NPSPAC asserts that its proposal endorses a Commission proposal to limit the regional planning process to governmental entities. *Final Report* at 29. By the term "public safety authorities" in the *Notice*, we included all entities eligible to be licensed in the Public Safety and Special Emergency Radio Services, not just governmental entities. *Notice*, 2 FCC Rcd at 2869, para. 6.

[28] The *Notice* proposed to make APCO the frequency coordinator for the new public safety spectrum. *Notice*, 2 FCC Rcd at 2871, para. 21. No objections were raised to this proposal. It is thus adopted, based on APCO's considerable experience and resources as coordinator for the Public Safety Radio Services.

[29] The Commission's Office of Engineering and Technology is making available a computer program that can be used as an aid to maximize spectrum utilization in developing regional plans. The program is designed to determine the optimum frequency assignment scheme that will maximize reuse, taking into account transmitter location and priorities in making channel assignments. Other methods or computer programs may be used to achieve efficient spectrum utilization.

[30] We strongly encourage regional planning groups to refer to NPSPAC's *Final Report* for useful information on preparation of regional plans. Copies of the *Final Report* are available from the FCC's duplication contractor, International Transcription Services, Inc., Suite 140, 2100 M Street, N.W., Washington, D.C. 20037, (202) 857-3800.

[31] According to the *Final Report*, at present, vacated frequencies in congested areas are, as a practical matter, reassigned by regional coordinators to other public safety entities. Local public safety organizations cooperate in this process by keeping each other informed of the need for additional frequencies and the potential for abandoning use of an existing assignment. *Final Report* at 48.

[32] NTIA Comments at 2. *See* Letter from Edward J. Minkel to Alfred C. Sikes (Dec. 18, 1986); Letter from Edward J. Minkel to Lieutenant General Winston D. Powers (Nov. 28, 1986).

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO DISSENTING IN PART AND CONCURRING IN PART

Re: Development and Implementation of a Public Safety National Plan, an Amendment of Part 90 to Establish Service Rules and Technical Standards for Use of the 821-824/866-869 MHz Bands by the Public Safety Service.

I am dissenting in part to the majority's decision in this proceeding based on the fact that the public has not had the opportunity to comment on the Commission's deter-

mination of what the national plan for public safety should be. I would have preferred releasing this *Report and Order* as an interim or tentative decision available for public comment. Due to the significant and far reaching implications of today's decision on the future of public safety, I think it would be both wise and prudent to seek a final round of public comment in this proceeding.

My colleagues believe that the public has had ample opportunity to comment during this proceeding and that a further comment cycle would create an unnecessary delay. While I do agree that public input has been sought in all phases of the National Public Safety Planning Advisory Committee's (NPSPAC) development of a national plan, I believe that to exclude public input at this decisive point when the Commission has developed its national public safety plan seems illogical. Whatever minor delays a final comment cycle may create must be weighed against the possible benefit public input may have on the Commission's national public safety plan. Furthermore, a final comment cycle would not delay the process of formulating regional plans, since such processes are currently underway, and public safety services will not have access to the 6 MHz until regional plans are approved.

Those who oppose a final comment cycle argue that if the public is concerned about the Commission's decision in this proceeding, then the public has the right to file Petitions for Reconsideration. Certainly, the public has the right to file such petitions, however, the criteria for granting reconsideration is rather specific *(See,* Section 1.429 of the Commission's rules). Parties who may have constructive comments to make on the Commission's national public safety plan, may not be able to justify filing a Petition for Reconsideration in light of the Commission's rules. When attempting to develop the best possible national public safety plan, I believe that it is essential to allow public comment without requiring the more onerous burden of filing Petitions for Reconsideration.

I concur with the rest of the national public safety plan. The national public safety plan is a beginning; a good beginning. The real proof of the national plan will be the individual plans developed and coordinated by the regions and to the extent these regional plans incorporate efficient use of spectrum and maximize interoperability.

I am most concerned with the plan's failure to specify technical standards that would provide for interoperability among radios produced by the various equipment manufacturers. To avoid the issue of standards altogether, the national plan reduces interoperability among noncompatible equipment to five interoperable channels. In essence, these five interoperable channels represent the "national" aspect of the national public safety plan. It is essential that the Commission foster the development of interoperable technology for the public safety services. As the world of public safety currently exists, public safety services often cannot communicate with each other. With the national plan, communication between and among non-compatible trunked systems will exist only on the five conventional interoperable channels. Beyond these interoperable channels, many public safety entities still will be unable to communicate with each other, unless they are using trunked radios produced by the same manufacturer. Since trunked radio systems currently produced by different manufacturers are incompatible, one way to assure interoperability would be to assure that only one manufacturer's equipment be used -- a situation I deem unthinkable. Nonetheless, without establishing standards providing for interoperability for future technology, we may be forcing public safety services which place a high value on interoperability to deal with only one equipment manufacturer. If public safety entities do not place high value on interoperability especially in highly congested areas, then the Commission's efforts in establishing a nation public safety plan is in vain. The item should have stressed that the Commission, regional planners, and others fully address the issues of interoperability.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-1

In the Matter of

Annual 1988 Access Tariff
Filings Phase I

ORDER ON RECONSIDERATION

Adopted: February 5, 1988; Released: February 8, 1988

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On December 29, 1987, the Southern New England Telephone Company (SNET) filed an emergency petition for reconsideration of this Bureau's December 24, 1987 Memorandum Opinion and Order in the above-referenced proceeding.[1] That Order reviewed the 1988 annual access tariff filings of the local exchange carriers and suspended SNET's proposed increases for special access services until March 1, 1988 pending investigation of certain demand-cost relationships. In its petition, SNET seeks reconsideration of that portion of the Order which suspended its proposed special access rate revisions and asks that we allow the revisions to become effective on January 1, 1988 as scheduled.

2. Our review of the annual 1988 special access tariff revisions disclosed numerous instances in which many of the allocations of the primary special access cost categories, Cable and Wire Facilities (CWF) and Central Office Equipment (COE), made by the large local exchange carriers (LECs) appear to have been misallocated or at least presented anomalous results in comparison to the demand quantities forecast for the test year. *December 24 Order* at para. 135. In other words, these LECs may not have properly accounted for forecast demand in developing their prospective cost allocation factors in the annual filing and their failure to do so may have produced interstate cost allocations to the special access category which overstate the special access revenue requirement and rates. This error would be significant because most of the LECs had forecast lower demand for certain special access services, particularly voice grade services. We accordingly suspended the effectiveness of special access rates of those carriers who both appeared to have used inconsistent demand projections and also proposed special access rate increases. Since SNET's filing appeared to suffer from this inadequacy, and it proposed rate increases, we included it among the carriers whose rates were suspended for two months pending investigation of the demand-cost discrepancies.[2]

3. In its petition, SNET asserts that contrary to this Bureau's findings it adjusted its cost allocation factors to account for reduced demand for special access services, resulting in a 3.4 million reduction in its special access revenue requirement. It attributes the approximately 2 million net increase in the revenue requirement for special access to the revised allocations resulting from the Commission's accounting, separations, and access charge rules changes. Accordingly, it argues that it should be treated in the same manner as other carriers that appeared to have made demand-related adjustments to their cost allocations and its proposed rate increases should not have been suspended.[3] No pleadings were filed in response to SNET's petition.

II. DISCUSSION

4. The essence of SNET's petition for reconsideration is that it did not merely apply separations allocation factors to broad categories of plant, but that it forecast loops, miles, and other underlying data at anticipated 1988 levels on the basis of forecasted reductions in the demand for special access services. Since we did not suspend the proposed special access rate increases of carriers that appeared to have adjusted their historical separations cost allocations to conform with forecast demand for the test year, SNET asks that we terminate the suspension of its proposed rate increases. SNET does not request reconsideration of our decision to investigate these cost-demand relationships, but only that its proposed rate increases not be suspended during the investigation. [4]

5. Upon reconsideration, we have decided to grant SNET's petition and terminate the suspension of its proposed 1988 special access rate increases effective upon the adoption of this Order. It appears that SNET did take its forecast changes in demand for the various special access services for the test year into account in developing its separations cost allocations and that the resultant relative decline in its private line loop and circuit mile ratios was reflected in the development of its special access revenue requirement. This is comparable to the showing made by those carriers whose rates were not suspended in the *December 24 Order*.

6. We have also reviewed the special access revisions proposed by New York Telephone (NYT). NYT apparently did not conform its revenue requirement calculations to its projected special access demand. However, while NYT initially proposed overall special access rate increases, on December 17, 1987, it proposed tariff revisions to correct other errors with the result that its proposed special access rates in fact represent reductions from the present rates.[5] Accordingly, we are also terminating the suspension of NYT's special access rates.[6] We will continue, however, to investigate the cost-demand relationships of SNET and NYT in this Docket in order to ascertain that the carriers' special access cost and demand projections are consistent and accurate.[7]

III. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED that the emergency petition for reconsideration of the Southern New England Telephone Company, filed December 29, 1987, IS GRANTED to the extent indicated herein.

8. IT IS FURTHER ORDERED that the suspension of the proposed special access rates of Southern New England Telephone Company, filed in its Transmittal No. 417, and of New York Telephone Company, filed in its Transmittal No. 878, IS TERMINATED effective upon the adoption of this Order.

9. IT IS FURTHER ORDERED that Southern New England Telephone Company and New York Telephone Company may file tariff revisions to reflect the termination of the suspension to be effective on not less than one day's notice. Special Permission No. 88-62 is assigned for this purpose and Sections 61.56 and 61.58 of the Commission's Rules, 47 C.F.R. §§ 61.56 and 61.58, are waived.

FEDERAL COMMUNICATIONS COMMISSION

Gerald Brock
Chief, Common Carrier Bureau

FOOTNOTES

[1] Annual 1988 Access Tariff Filings, DA 87-1876, released Dec. 24, 1987 (*December 24 Order*).

[2] We suspended the special access rates filed by Ameritech (except Indiana), Bell Atlantic, New England Telephone and Telegraph Company, New York Telephone Company, US West (except Northwestern Bell), the GTE Telephone Companies (California, Florida, Texas and Washington), Cincinnati Bell and Southern New England Telephone Company. On January 13, 1988, we issued an Order designating the demand-cost issues for investigation and establishing a pleading cycle. *See* Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase I, DA 88-16, released Jan. 14, 1988.

[3] We did not suspend the proposed rate increases of the Bell-South companies, Pacific Bell and Southwestern Bell because they appeared to have adjusted historical separations cost allocations to conform with forecast demand for the test year. They are, however, included in our investigation.

[4] SNET has filed its direct case in the investigation proceeding.

[5] *See* Application for Special Permission of New York Telephone Company, No. 113, filed Dec. 17, 1987.

[6] Of course, our action here in terminating these suspensions has no effect on our authority to take appropriate action upon the completion of our investigation in Docket 88-1.

[7] NYT has also filed its direct case. As a result of our action here, however, oppositions to the direct cases of SNET and NYT in Docket 88-1 will not be due on February 11, 1988, as was specified in our recent Order reconsidering Western Union's motion for an extension of time in that Docket. *See* Annual 1988 Access Tariff Filings, DA 88-108, released Feb. 2, 1988. We will establish a date for these pleadings in a future Order.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

VINCENT L. HOFFART — FOIA Control No. 86-178

On Request for Inspection of Records

MEMORANDUM OPINION AND ORDER

Adopted: February 17, 1988; Released: Febraury 25, 1988

By the Commission:

1. Before the Commission is an Application for Review filed by Mr. Vincent L. Hoffart on May 12, 1987, seeking review of the Mass Media Bureau's initial ruling on his request for inspection of agency records pursuant to the Freedom of Information Act, 5 U.S.C. § 552.

2. Mr. Hoffart requests inspection of various documents and seeks responses to several informational inquiries regarding the permits, licenses, installation and operation of FM Translator Station K283AA, Seattle, Washington. In its initial ruling, the Bureau stated that the documents Mr. Hoffart sought were routinely available Commission records contained in the K283AA station file. The Bureau declined to respond to Mr. Hoffart's informational inquiries.

3. On review, Mr. Hoffart contends that additional documents should have been made available to him. [1] Further, Mr. Hoffart again seeks responses to certain questions that relate to the operation of Station K283AA.

4. Our review demonstrates that all documents responsive to Mr. Hoffart's request have been made available to him. Further, the FOIA creates only a right of access to agency records. Responses to a requester's informational inquiries, framed as a part of an FOIA request, are outside the purview of the Act. *Zemanski v. EPA*, 767 F.2d 569, 574 (9th Cir. 1985); *Hudgens v. IRS*, 620 F. Supp. 19, 21 (D.D.C. 1985) ("FOIA creates only a right of access to records, not a right to personal services").

5. Accordingly, IT IS ORDERED, That the Application for Review filed by Vincent L. Hoffart IS DISMISSED AS MOOT TO THE EXTENT INDICATED HEREIN, AND IS OTHERWISE DENIED. Judicial review of this action may be sought pursuant to 5 U.S.C. § 552(a)(4)(B).

The officials responsible for this action are the following Commissioners: Dennis R. Patrick, Chairman, James H. Quello, Patricia Diaz Dennis.

FEDERAL COMMUNICATIONS COMMISSION

H. Walker Feaster
Acting Secretary

FOOTNOTE

[1] On June 10, 1987, subsequent to the filing of the instant Application for Review, two additional documents were made available to the requester. *See* Appendix A. Therefore, to the extent the Application for Review requests disclosure of additional documents, it is now moot. On June 22, 1987, Mr. Hoffart filed a second FOIA request. No documents responsive to this request, other than those already made available to Mr. Hoffart, have been located. Therefore, the second request of Mr. Hoffart will, by separate action, be dismissed as moot.

APPENDIX A

1. Application for Authority to Construct or Make Changes to a TV or FM Broadcast Translator Station, filed by Dena Pictures, Inc. & Alexander Broadcasting Co., a joint venture, d/b/a Kaye-Smith Enterprises, dated May 17, 1975, 21 pages.

2. Renewal License for a Broadcast Translator Station (originally issued July 13, 1982), corrected May 14, 1987, attached to letter from Edward W. Hummers, Jr., Counsel for Nationwide Communications, Inc. to Alan Schneider, Esq., Chief, Auxiliary Services Branch, Mass Media Bureau, Federal Communications Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-492

In re Applications of

WALTER GRAY GILBERT File No. BPH-860114NB

For Construction Permit for a New
FM Station on Channel 245A in
Indianola, Mississippi

Appearances

Julian P. Freret on behalf of Walter Gray Gilbert.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE WALTER C. MILLER

Issued: February 3, 1988; Released: February 26, 1988

INTRODUCTION

1. The sole remaining applicant, Walter Gray Gilbert (Gilbert) filed a "Petition for Leave to Amend And For Summary Decision" on February 1, 1988. There Gilbert seeks to do two things. First, he wants to reduce his proposed antenna structure from 353 feet above ground to 221 feet above ground; i.e., to a height the FAA has approved.

2. Secondly, and as amended, Gilbert wants a favorable summary decision on the only basic qualifying issue outstanding against him,[1] and his application granted. He has attached a copy of the January 21, 1988 FAA approval to his Petition.

PRELIMINARY RULING

3. Gilbert's amendment request will be granted. Granting that amendment will permit him to address the only remaining issue against him, and eliminate the need for an administrative hearing on that issue. So good cause exists for granting his amendment.

FINDINGS OF FACT

4. The Chief, Audio Services Division designated an air hazard issue against Gilbert, because the FAA indicated that it had never received Gilbert's FAA Form 7460-1. See 52 F.R. 43111 *supra*, at para. 4.

5. On November 15, 1987, Gilbert filed his FAA Form 7460-1 with the FAA. There he proposed an antenna structure that would be 353 feet above ground. A little later the FAA notified Gilbert that it could not approve an antenna tower 353 feet above ground, but that it would approve a 221 foot tower. Gilbert has now moved to meet the FAA's concerns, and the amendment reducing his antenna height has been approved (para. 3 *supra*.).

6. On January 21, 1988, the FAA's East Point, Georgia Office ruled that Gilbert's proposal is not identified as an obstruction and would not be a hazard to air navigation. So Gilbert has demonstrated that his proposed antenna structure will not pose a hazard to air navigation. The truth is clear. No genuine issue of fact exists, and designated Issue 1 is resolved in Gilbert's favor.

CONCLUSIONS OF LAW

7. With the air hazard issue resolved in his favor, and no other basic qualifying issue remaining against him, Gilbert's FM Indianola application can be granted. He is qualified to construct and operate as proposed. See 52 F.R. 43111 *supra*., at para. 5.

SO the Petition for Leave to Amend And For Summary Decision that Walter Gray Gilbert filed on February 1, 1988, IS GRANTED;

The accompanying amendment IS ACCEPTED; and

Unless an appeal is taken from this Summary Decision or the Commission reviews it on its own motion, Walter Gray Gilbert's application for Indianola, Mississippi (File No. BPH-860114NB) as amended, IS GRANTED;[2] and

This proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Walter C. Miller
Administrative Law Judge

FOOTNOTES

[1] See 52 F.R. 43111 published November 9, 1987, Issue 1.

[2] If exceptions aren't filed within 30 days, and the Commission doesn't review the case on its own motion, this Summary Decision will become effective 50 days after its public release.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

INFINITY BROADCASTING CORPORATION
OF PENNSYLVANIA,
Licensee of Station WYSP(FM)

In the Matter of

PACIFICA FOUNDATION, INC.
Licensee of Station KPFK-FM,
Los Angeles, Ca.

In the Matter of

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA,
Licensee of Station
KCSB-FM, Santa Barbara, Ca.

MEMORANDUM OPINION AND ORDER

Adopted: November 24, 1987; Released: December 29, 1987

By the Commission: Commissioner Dennis concurring and issuing a statement.

I. BACKGROUND

1. The Commission has before it for consideration petitions and comments[1] pertaining to three rulings adopted on April 16, 1987, involving the prohibition contained in 18 U.S.C. § 1464 against the broadcast or transmission of indecent material.[2] *See Pacifica Foundation, Inc.*, 2 FCC Rcd 2698 (1987) (*KPFK - FM); The Regents of the University of California*, 2 FCC Rcd 2703 (1987) (*KCSB - FM); Infinity Broadcasting Corp. of Pa.*, 2 FCC Rcd 2705 (1987) (*WYSP (FM)*). [3]

2. The Communications Act of 1934, as amended, empowers the Commission to impose administrative sanctions for violations of Section 1464, including warnings, imposition of fines and, in severe cases, the revocation of licenses.[4] In 1975, the Commission ruled that a 12-minute monologue by comedian George Carlin entitled "Filthy Words" broadcast by Station WBAI(FM), New York, New York, at 2:00 p.m. in the afternoon was indecent within the meaning of Section 1464.[5] In so ruling, the Commission defined indecency as "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs, when there is a reasonable risk that children may be in the audience."[6] The Commission said that the concept of indecency is intimately connected with the exposure of children to material that most parents regard as inappropriate for them to hear.[7] Analogizing to the law of nuisance, the Commission said such material is inappropriate for broadcast when there is a reasonable risk that children may be in the audience.[8] The Commission suggested that this risk might not exist during late evening hours and that indecent programs could conceivably be broadcast at such times, if accompanied by appropriate warnings.[9]

3. The Supreme Court upheld the Commission.[10] The Court observed that the ease with which children may obtain access to broadcast material, coupled with the government's interest in protecting the well-being of its youth, and parents claim to authority in their homes, amply justify the channeling of indecent broadcasts. Thus, stressing the Commission's nuisance theory, the Court concluded that the FCC may, consistent with the first amendment, require broadcasters to channel indecent speech to times of day when there is not a reasonable risk that children may be in the audience.[11]

4. In cases decided subsequent to the Supreme Court's ruling, the Commission took a very limited approach to enforcing the prohibition against indecent broadcasts.[12] Unstated, but widely assumed, and implemented for the most part through staff rulings, was the belief that only material that closely resembled the George Carlin monologue would satisfy the indecency test articulated by the FCC in 1975.[13] Thus, no action was taken unless material involved the repeated use, for shock value, of words similar or identical to those satirized in the Carlin "Filthy Words" monologue. Also widely shared was the view that such broadcasts would be actionable only if aired before 10:00 p.m.[14] As a result, the Commission, since the time of its ruling in 1975, has taken no action against any broadcast licensee for violating the prohibition against indecent broadcasts.

5. Our April 1987 rulings in the three cases required us to readdress the subject thoroughly at the full Commission level for the first time since the Supreme Court's 1978 decision. On close analysis, we found that the highly restricted enforcement standard employed after the 1975 *Pacifica* decision was unduly narrow as a matter of law and inconsistent with our enforcement responsibilities under Section 1464. Essentially, we concluded that, although enforcement was clearly easier under the former standard, it could lead to anamolous results that could not be justified. Under that standard, material that portrayed sexual or excretory activities or organs in as patently offensive a manner as the earlier Carlin monologue -- and, consequently, of concern with respect to its exposure to children -- would have been permissible to broadcast simply because it avoided certain words. That approach, in essence, ignored an entire category of speech by focusing exclusively on specific words rather than the generic definition of indecency. This made neither legal nor policy sense. Accordingly, we concluded that we must take the more difficult approach to enforcing Section 1464. Therefore, each of our rulings advised broadcasters that in judging indecency complaints, we shall use the generic definition of indecency articulated by the Commission in 1975 and approved by the Supreme Court in 1978 as applied to the Carlin monologue. In applying that definition to the three cases before us in April, we recognized the importance of context to indecency determinations, noting that such determinations cannot be made in the abstract. Instead, we determined, based on the facts of each case, that the broadcasts at issue -- or certain portions thereof -- were indecent.[15] We also found that, at least with respect to the particular markets involved, available evidence suggested there were still significant num-

bers of children in the audience at 10:00 p.m. We therefore advised that broadcasters should no longer assume that 10:00 p.m. is automatically the time after which indecent broadcasts may safely be aired. Rather, we indicated that indecent material would be actionable (that is, would be held in violation of 18 U.S.C. § 1464), if broadcast when there is a reasonable risk that children may be in the audience, a determination that was to be based on ratings data on a market-by-market basis.

6. In sum, in each of the cases before us, we found that the licensee had broadcast indecent material on the particular programs in question, at a time when there was a reasonable risk of children in the audience. We declined to take enforcement action, however, because each broadcaster had proffered a reasonable basis for believing it was permissible to air the subject material under the circumstances involved. Therefore, we limited ourselves to warning the licensees that the broadcasts would be actionable under the revised enforcement standards made clear in our decisions.

II. THE PLEADINGS

7. Petitioner NAB asks the Commission to clarify, and petitioner ACT asks us to reconsider, not our rulings themselves, but the rulings as characterized in the public notice summarizing the cases. Petitioners do not challenge the Commission's authority to channel indecent broadcasts to late night hours. Instead, they maintain that our construction of Section 1464 is unconstitutionally vague and overbroad. To remedy these asserted constitutional failings, petitioners ask us to adopt several revisions. Collectively, they urge us to: (1) provide more precise guidance as to the elements pertinent to whether material is "patently offensive and violates "contemporary community standards for the broadcast medium"; (2) consider the literary, artistic, political and scientific value of programming in judging whether it is patently offensive and, thus, indecent; (3) exempt news and informational programming from a finding of indecency; (4) defer to reasonable good faith judgments made by licensees applying the requirements set forth by the Commission; (5) apply rulings prospectively, not sanctioning licensees until they have notice that particular material has been judged to be indecent; and (6) adopt a fixed time of day after which non-obscene, adult oriented programming may be aired, or articulate a similar "bright line test.[16]

8. In contrast, MIM argues in its comments that the Commission has not gone far enough in its regulation of indecency. MIM asserts that indecent material cannot be aired by a broadcaster at any time because the prohibition set out in 18 U.S.C. § 1464 is, on its face, absolute and unqualified. MIM also suggests that the present definition of indecency be expanded to encompass a wide range of material, including that which is "more than indelicate and less than immodest." MIM generally urges the Commission to reject the positions advanced by petitioners.

III. DISCUSSION

9. As the Supreme Court has stressed, pronouncements about broadcast indecency should be confined to specific factual settings because of the crucial role of context to the issue.[17] For this reason, we decline to address at length the generalized contentions of the parties. To dispel apparent uncertainty about the scope and effect of our recent rulings, however, we will briefly review the applicable standards and the points raised to the extent they bear on the three cases before us.[18]

10. As a threshold matter, we acknowledge the difficulty and the sensitivity of the task at hand. Provocative programming will inevitably offend some listeners or viewers, but we must always be mindful of the first amendment limitations on the government's ability to regulate the content of speech. The consistent and long-held policy under the Communications Act has been to preserve radio and television as media of free speech and free expression. By law, however, the Commission is duty-bound to enforce the restrictions on indecent radio transmissions.[19] And, of course, we must do so consistent with constitutional requirements. Our task is to harmonize these responsibilities with due regard for the competing interests involved.

11. We begin our consideration of petitioners requests as we began our 1975 *Pacifica* ruling, by stating: "In order to avoid the error of overbreadth, it is important to make it explicit whom we are protecting and from what."[20] In exercising its authority to enforce the prohibition against indecency expressed in Section 1464, the Commission is advancing the government interest in safeguarding children from patently offensive descriptions or depictions of sexual or excretory activities or organs, so as to enable parents to decide effectively what material of this kind their children will see or hear.[21] The United States Court of Appeals for the Second Circuit has held that this "interest in protecting children from salacious material is no doubt quite compelling."[22]

12. MIM urges us to apply Section 1464 in a manner that would prohibit at all times of the day the broadcast of certain sexually explicit, yet non-obscene material. When the Supreme Court affirmed the Commission's *Pacifica* ruling in 1978, however, it made plain that our authority under Section 1464 is limited to the imposition of reasonable time, place and manner restrictions on the broadcast of indecent material in order to advance the government's interest in protecting children and in enabling parents to determine when and how their children are to be exposed to this material.[23] It is clear that our application of Section 1464 must be consistent with the constitutional principles derived from the *Pacifica* decision. Thus, under Section 1464, we may only do that which is necessary to restrict children's access to indecent broadcasts; we may not go further so as to preclude access by adults who are interested in seeing or hearing such material.[24] The unqualified reading of Section 1464 pressed by MIM, under which the broadcast of indecent material would be prohibited altogether would, we believe, run afoul of this constitutional premise.[25] With this brief preface, we turn to petitioners§ arguments, which we evaluate in the context of our three rulings in April.

Patent Offensiveness and the Role of Merit

13. Petitioners seek further clarification of the term "patently offensive," as that term is used in the definition of indecency. Specifically, petitioners inquire as to the relevance of a work's serious literary, artistic, political or scientific value (*i. e.*, serious merit) in determining whether particular material is patently offensive and, thereby, indecent.

14. "Patently offensive" is a phrase that must, of necessity, be construed with reference to specific facts. We cannot and will not attempt to provide petitioners with a

comprehensive index or thesaurus of indecent words or pictoral depictions that will be considered patently offensive. There is no way to construct a definitive list that would be both comprehensive and not over-inclusive in the abstract, without reference to the specific context. All we hold here, therefore, is that, in the three cases before us, we properly found the material identified as indecent to be patently offensive.

15. Our approach here is consistent with that of the courts, which have likewise never attempted to identify with the degree of certainty requested by petitioners the complete and definitive range of material that fall within the generic, legal definitions of certain categories of speech. We note, for example, that the phrase "patently offensive" is also used in the obscenity context and that the courts insist on construing that phrase with reference to specific facts, thereby developing its meaning on a case-by-case basis.[26] The fact that its meaning can only be given greater specificity on a case-by-case basis does not make the term "patently offensive unconstitutionally vague in the indecency context any more than it does in the obscenity context.[27] Broadcasters, when judging whether certain material is legally indecent, must exercise the same kind of judgment that they are obligated to exercise when judging whether certain material is legally obscene. They must apply a generic definition with reference to the guidance provided by existing case law on the matter. Broadcasters may not reasonably expect to relieve themselves of this legal obligation by demanding that we exercise their editorial judgment for them.

16. As we stated in our April rulings, and as we re-emphasize today, the question of whether material is patently offensive requires careful consideration of context.[28] The Supreme Court has said that the term "context" encompasses a "host of variables."[29] These variables, whose interplay will vary depending on the facts presented, include, as the Court noted, an examination of the actual words or depictions in context to see if they are, for example, "vulgar" or "shocking,"[30] a review of the manner in which the language or depictions are portrayed,[31] an analysis of whether allegedly offensive material is isolated or fleeting,[32] a consideration of the ability of the medium of expression to separate adults from children,[33] and a determination of the presence of children in the audience.

17. The merit of a work is also one of the many variables that make up a work's "context," as the Court implicitly recognized in *Pacifica* when it contrasted the Carlin monologue to Elizabethan comedies and works of Chaucer.[34] But merit is simply one of many variables, and it would give this particular variable undue importance if we were to single it out for greater weight or attention than we give other variables. We decline to do so in deciding the three cases before us. We must, therefore, reject an approach that would hold that if a work has merit, it is *per se* not indecent.[35] At the same time, we must reject the notion that a work's "context" can be reviewed in a manner that artificially excludes merit from the host of variables that ordinarily comprise context.[36] The ultimate determinative factor in our analysis, however, is whether the material, when examined in context, is patently offensive. In the three cases before us, we reaffirm our prior rulings answering this question in the affirmative.

18. The material that the Commission identified in the *KPFK - FM* case as indecent occurred in the context of a 10:00 p.m. radio broadcast of excerpted portions of a theatrical play. The excerpted portions that were broadcast contained the concentrated and repeated use of vulgar and shocking language to portray graphic and lewd depictions of excretion, anal intercourse, ejaculation, masturbation, and oral-genital sex.[37] Despite Pacifica's claim that very few children ordinarily listen to KPFK-FM at 10:00 p.m., we nevertheless determined, on the basis of available data for that market, that there was a reasonable risk that children may have been in the radio audience at the time of the broadcast. We also believe that many of those children who may have listened to the subject broadcast would have readily understood the discussion, as would other children who may have randomly tuned in. Once having tuned in, they may have continued to listen because the references were more than fleeting or isolated.

19. The material described sexual and excretory activities and organs in a manner that was patently offensive according to contemporary community standards for the broadcast medium. Indeed, we find it hard to imagine the broadcast of sexually-related language in a more patently offensive manner than in the excerpts highlighted in our *KPFK - FM* ruling. The fact that the material presented was excerpted from a dramatic performance that dealt with homosexual relations and Acquired Immune Deficiency Syndrome (AIDS) does not affect our determination that the *manner* in which these subjects were dealt with in the excerpts was patently offensive. Nor does Pacifica's claim that the play from which the excerpts were taken has been critically acclaimed and long-running in Los Angeles area theaters change the determination. We do not dispute the public value of programming addressing the serious problems posed by AIDS or its effect on the homosexual community. We emphasize that subject matter alone does not render material indecent. Only when that material is presented in a *manner* that is patently offensive will it be considered indecent. In *KPFK - FM*, we simply found that the excerpted materials, considered in context, were patently offensive; and we held that when such material is broadcast in such a manner and at a time when there is a reasonable risk that children may be in the audience, then that broadcast will constitute actionable indecency within the meaning of Section 1464.

20. For similar reasons, we found that morning broadcasts of portions of the Howard Stern show constituted actionable indecency. The relevant material at issue in the *WYSP FM)* ruling occurred in varying contexts: it was presented, at times, as part of discussions among Howard Stern and his fellow broadcast personalities, as part of call-in conversations between members of Mr. Stern's audience and broadcast personnel, and as part of situation comedy routines staged by the members of the broadcast team. All of the excerpted material, however, consisted of vulgar and lewd references to the male genitals and to masturbation and sodomy broadcast in the context of what we described, and which has not been disputed, as "explicit references to masturbation, ejaculation, breast size, penis size, sexual intercourse, nudity, urination, oral-genital contact, erections, sodomy, bestiality, menstruation and testicles."[38] Furthermore, all of the material was presented on the radio at times when significant numbers of children were in the listening audience, during the 6:00 a.m. - 10:00 a.m. Howard Stern show. Further, although we agreed that much of the programming involved innu-

endo and double entendre -- that is, it was oblique or susceptible to varying interpretations -- and therefore did not constitute indecency, we also determined that the sexual import of certain references in the material was inescapable and understandable given the surrounding context of the discussion. In short, it was not merely sexual innuendo or double entendre, despite Infinity's assertions to the contrary. Additionally, the fact that the programs under examination did not contain merely an occasional off-color reference or expletive, but instead dwelt on sexual and excretory matters in a pandering and titillating fashion indicated that children who may have randomly tuned into them would have likely continued to listen.

21. Given this context, the Commission determined that portions of the broadcasts contained material that was presented in a manner that was patently offensive according to contemporary community standards for the broadcast medium. Although different from the programming at issue in *KPFK - FM*, the sexual references excerpted in our *WYSP (FM)* ruling shared their same patently offensive character. Nothing about the context changed this determination.

22. Finally, the song lyrics in *KCSB - FM* were indecent for similar considerations.[39] The material at issue in that case was presented in the context of a musical recording broadcast at a time of day when the Commission determined that there was a reasonable risk that children may have been in the radio audience. The material contained both lewd references to the male genitals and lewd descriptions of intercourse and oral-genital sex. The lyrics, like the programming at issue in the other cases before us, graphically portrayed these sexual organs and activities in a manner that was patently offensive.

23. Furthermore, the explicitness of some of the lyrics rendered any purported innuendo or double entendre in the remainder of the song clear and capable of a specific, sexual meaning. The lyrics were intelligible, and their meaning could have been clearly understood by children who may have been in the listening audience. The fact that the material occurred in the context of a musical recording did not mitigate the patently offensive manner in which that material was presented. Therefore, we determined that the broadcast constituted actionable indecency.

Contemporary Community Standards for the Broadcast Medium

24. Petitioners also ask for clarification of the phrase "contemporary community standards for the broadcast medium," as that term is used in the indecency definition and was used in each of our three April rulings. We clarify that the Commission used the term "contemporary community standards" in a manner analogous to the definition set forth in the Supreme Court's decision in *Hamling v. United States*.[40] In that case, the Court explained that the purpose of "contemporary community standards was to ensure that material is judged neither on the basis of a decisionmaker's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group.[41] Rather, decisionmakers are to draw on their views of the average person in the community. The Court also noted that, by referring to contemporary community standards in *Miller*, it did not intend to require, as a constitutional matter, the use of any precise geographic area in evaluating material.[42] Hence, in a Commission proceeding for indecency, in which the Commission applies a concept of "contemporary community standards for the broadcast medium," indecency will be judged by the standard of an average broadcast viewer or listener. Thus, we determined in each of the three cases before us that an average listener would find material patently offensive. In making the required determination of indecency, Commissioners draw on their knowledge of the views of the average viewer or listener, as well as their general expertise in broadcast matters. The determination reached is thus not one based on a local standard, but one based on a broader standard for broadcasting generally.

The Role of Reasonable Licensee Judgments

25. Petitioner ACT urges us to defer to reasonable, good faith judgments of licensees in deciding whether a licensee has violated Section 1464. In this way, ACT contends, we will help to avoid inhibiting programming decisions and intruding into the broadcast editorial process. In a related vein, petitioner NAB advocates a policy under which Commission rulings would have prospective effect only. Under this approach, the Commission would refine its standards of what is indecent on a case-by-case basis, but would not penalize a licensee for a broadcast unless the licensee had specific notice that the Commission or a court had previously found that broadcast to be indecent. Absent a ruling squarely on point, a licensee's decision to air programming would be considered reasonable and automatically beyond the reach of Section 1464 under this scenario.

26. ACT does not contend that deference to reasonable licensee judgments in interpreting Section 1464 is required as a matter of law, and we find no basis on the record before us to allow such judgments to preclude a finding that a licensee has violated its statutory duties. Indeed, given the variety of programming aired by licensees, such a policy would largely read the prohibition against indecent transmissions out of Section 1464. Congress cannot have intended such a result, and we find no basis for reading such a provision into the statute. Although we acknowledge that the statute requires a broadcaster to make judgments as to whether certain material would violate the statute, the fact that the decision may not always be an easy one cannot excuse the broadcaster from having to exercise its judgment, any more than it can excuse the Commission from exercising its enforcement responsibilities. We note, however, that it is standard procedure for the Commission, in deciding whether to impose a sanction for violation of the law and, if so, what those sanctions should be, to give weight to the reasonable determinations of licensees endeavoring to comply with the law.[43] Because licensees demonstrating reasonable judgment have no cause to fear the imposition of unjustified sanctions,[44] we reject the petitioners§ contentions that the editorial decisions of broadcasters will be inappropriately chilled by continuation of this approach.[45]

27. We used precisely this approach in the cases before us. Although we did not consider the licensees reasonableness in concluding that the material was indecent, pivotal to our decision not to impose sanctions was the fact that each licensee demonstrated a reasonable basis to believe, based on prior Commission and staff rulings, that the programming under review was permissible to broadcast. For example, in each case, we weighed favorably the licensee's reasonable belief that only repetitive use of the expletives at issue in the 1975 *Pacifica* case would be found indecent, and the fact that none of these cases

involved repetitive expletives in a manner closely resembling the "Filthy Words" monologue.[46] Moreover, in *WYSP (FM)*, Infinity Broadcasting's added reliance on staff rulings addressing analogous broadcasts, some of which involved Infinity, further buttressed our decision not to take action against the licensee. Finally, in *KCSB - FM* and *KPFK - FM*, the fact that the licensees aired broadcasts containing indecent utterances after 10:00 p.m. gave added weight to our decision not to sanction the licensees, in view of previous Commission rulings suggesting that it might be permissible to do so after that time.[47] For all these reasons, rather than imposing a sanction, we simply warned each licensee, as well as broadcasters generally, that our enforcement standards have changed and that these broadcasts would be actionable under the new standards.[48]

III. CONCLUSION

28. Nothing said herein changes the outcome in any of the decisions in question. The Commission, therefore, reaffirms each of the above-captioned rulings. In each case, we reviewed a tape recording of the programming involved to determine whether the context was such that the licensee had aired sexual or excretory material in a manner that was patently offensive as measured by contemporary community standards for the broadcast medium.[49] Because we found that each had aired such material in a manner that was patently offensive according to contemporary community standards for the broadcast medium, we determined that each had broadcast indecent material. We emphasize the narrowness of our holdings in that they are limited to the specific broadcasts at issue. We hold simply that the broadcasts here, illustrative portions of which are attached hereto in the Appendix, meet the definition of indecency affirmed by the Supreme Court in *Pacifica*.

29. Furthermore, these indecent broadcasts were aired when there was a reasonable risk that chidren may have been in the audience. Accordingly, they were broadcast in violation of Section 1464. We also reaffirm our conclusion in April that prior rulings could have led the licensees reasonably to conclude that the broadcasts were permissible. Thus, while we warned these and other licensees that the programs were, in fact, indecent and must be channeled, and even then preceded and accompanied by appropriate warnings, we did not and do not impose any sanctions upon these licensees.

30. ACCORDINGLY, IT IS ORDERED, that the Petition for Reconsideration, filed June 1, 1987 by Action for Children's Television, *et al.*, and the Petition for Clarification, filed June 1, 1987 by the National Association of Broadcasters, ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

APPENDIX

I. Excerpts from August 31, 1986, 10 : 00 p. m. " IMRU " broadcast ; Pacifica Foundation, KPFK - FM, Los Angeles, California :

"Yeah, it was loving even if you didn't know whose cock it was in the dark or whose asshole you were sucking.

"I'll give you the gentlest fuck west of the Mississippi.

"We cuddled and played around a bit before he started working on my ass.

"I remember he was kneeling between my legs and he worked my asshole with lube for the longest time - just gettin it to relax so there was no tension, no fear.

"He lowered himself on top of me and slid his dick in all the way, but so gently, so smoothly, there wasn't even a bit of pain.

"His cock felt warm inside me - and full - so nice and full. So he began sliding his cock back and forth inside of my ass - but so gently, so gently.

"I don't think I've ever had such a gentle, sensitive fuck before or after.

Well, he must have gone at it for twenty minutes at the very least, just slidin his cock back and forth inside of my ass.

"And then he whispered to me, 'You're gonna feel me come inside of you. And I did. Man, I could feel the cum pulse up his shaft inside my ass. I could count the pulses and it felt warm and good.

Actor 1 : "You better get yourself ready for some brother-to-brother, sweaty, down and dirty pig sex, you understand?

Actor 2 : "Yeah!

1 : None of this nicey-nice, lovey-dovey stuff. I want to make you eat ass, suck my balls, and drink my piss like you never have before. You get me?

2 : "Hot throbbing cocks, hard pounding muscles.

1 : "You've got it.

II. Excerpts from various weekday 6 : 00 - 10 : 00 a. m." Howard Stern Show broadcasts ; Infinity Corporation, WYSP (FM), Philadelphia, Pennsylvania :

Excerpt 1

Howard Stern : "God, my testicles are like down to the floor. Boy, Susan, you could really have a party with these. I'm telling you honey.

Ray : "Use them like Bocci balls.

Excerpt 2

Howard Stern : "Let me tell you something, honey. Those homos you are with are all limp.

Ray : "Yeah. You've never even had a real man.

Howard Stern : "You've probably never been with a man with a full erection.

Excerpt 3 Susan : "No. I was in a park in New Rochelle, N.Y.

Howard Stern : "In a park in New Rochelle? On your knees?

Susan : "No, no.

Ray : "And squeezing someone's testicles, probably.

Excerpt 4

Talking to a caller

Howard Stern : "I'd ask you your penis size and stuff like that, but I really don't care.

Excerpt 5

As part of a discussion of lesbians

Howard Stern : "I mean to go around porking other girls with vibrating rubber products and they want the whole world to come to a standstill.

Excerpt 6

Howard Stern : "Have you ever had sex with an animal?

Caller : "No.

Howard Stern : "Well, don't knock it. I was sodomized by Lambchop, you know that puppet Sherri Lewis holds.

Howard Stern : "Baaaaah. That's where I was thinking that Sherri Lewis, instead of like sodomizing all the people at the Academy to get the shot on the Emmys she could have had Lambchop do it.

III. Excerpt from July 26, 1986, 10 : 00 p. m. (approximate) broadcast of " MakinBacon "; The Regents of the University of California, KCSB - FM, Santa Barbara, California :

Makin' bacon, makin' bacon, makin' bacon, makin' bacon! (Inaudible)

A ten-inch cropper with a varicose vein!
Makin bacon is on my mind

Come here baby, make it quick
Knee I down there and suck on my dick
Makin bacon is on my mind
Makin bacon is on my mind

Turn around baby let me take you from behind
Makin bacon is on my mind

With your blue, blue knickers, you look so neat
Bend over baby, gonna give you my meat
Makin bacon is on my mind

Get down baby on your hands and knees
Take my danish and give it a squeeze
Makin bacon is on my mind
Makin bacon is on my mind

Turn around baby let me take you from behind
Makin bacon is on my mind

* * *

Hey baby, got something to chew
Deep throat, baby, it's good for you
Makin bacon is on my mind

* * *

Makin bacon is on my mind

Turn around baby, let me take you from behind
Makin bacon is on my mind

FOOTNOTES

[1] These include a Petition for Clarification, filed June 1, 1987, by the National Association of Broadcasters (NAB Petition); a Petition for Reconsideration, filed June 1, 1987, by Action for Children's Television, Association of Independent Television Stations, Inc., Capital Cities/ABC, Inc., CBS Inc., EZ Communications, Inc., Motion Picture Association of America, Inc., National Broadcasting Company, Inc., National Public Radio, The New York Times Company, People for the American Way, Post-Newsweek Stations, Inc., Public Broadcasting Service, Radio-Television News Directors Association, The Reporters Committee for Freedom of the Press, and Society of Professional Journalists, Sigma Delta Chi (ACT Petition) (collectively "petitioners); Comments, filed June 15, 1987, by the Maryland-Districtof Columbia-Delaware Broadcasters§ Association (MDCD); Comments, filed July 6, 1987, by Morality In Media, Inc. (MIM); and, Reply Comments, filed July 21, 1987, by ACT.

[2] 18 U.S.C. § 1464. The section provides: "Whoever utters any obscene, indecent or profane language by means of radio communication shall be fined not more than 10,000 or imprisoned not more than two years, or both."

[3] Also decided the same day was a case involving indecent transmissions by an amateur radio licensee. *David Hildebrand (N6BHU)*, 2 FCC Rcd 2708 (1987). Shortly afterward, the Commission issued a public notice, in which it summarized the orders and indicated that it was putting all licensees on notice as to the new enforcement standards set forth in these cases. *Public Notice*,

FCC 87-153 (released April 29, 1987), 2 FCC Rcd 2726 (1987). Petitioning and commenting parties here limit themselves to the broadcast-related rulings, and we do the same.

[4] 47 U.S.C. §§ 312(a)(6), 503(b)(1)(D).

[5] *Pacifica Foundation*, 56 FCC 2d 94 (1975) (*WBAI (FM)*).

[6] *Id.* at 98. In our recent actions, we treated the nature of the material involved and the time of day that children are in the audience separately because we believe that the question of the time of a "patently offensive" broadcast is more pertinent to channeling and to whether a broadcast is "actionable" under 18 U.S.C. § 1464 than to whether it is indecent. We note, however, that because the aim of broadcast indecency regulation is to protect children, a violation finding will only be entered if both components of the test are met -- *i.e.* material must be both indecent and broadcast when there is a reasonable risk that children may be in the audience.

[7] *See id.*

[8] The Commission distinguished indecency from obscenity, noting that the latter is governed by the standards set forth in *Miller v. California*, 413 U.S. 15 (1973). Under the *Miller* test, obscene material is that which: (1) the average person, applying contemporary community standards, would find, taken as a whole, appeals to the prurient interest; (2) depicts or describes in a patently offensive way sexual conduct; and (3) taken as a whole, lacks serious literary, artistic, political, or scientific value. *Id.* at 24. *See generally WBAI (FM)*, 56 FCC 2d at 97-98. Recently, the Supreme Court further elaborated on the third criterion by holding that the determination of whether material lacks serious literary, artistic, political or scientific value should be made on the basis of a "reasonable person" standard, not a "contemporary community" standard. *Pope v. Illinois*, 107 S.Ct. 1918 (1987).

[9] *See WBAI (FM)*, 56 FCC 2d at 100.

[10] *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978).

[11] *Id.* at 748-50; *see id.* at 757-59 (Powell, J., concurring). The Court also noted that the Commission relied on spectrum scarcity of the broadcast medium to provide additional support for such a requirement. The Court did not rely on that rationale, however, in upholding the Commission. *Id.* at 747-750; *see id.* at 758-761 (Powell, J., concurring). Our April 1987 rulings expressly rejected this rationale (*see, e. g., KPFK-FM*, 2 FCC Rcd at 2699 ¶ 15), and we do not rely on it herein.

[12] *See WGBH Educational Foundation*, 69 FCC 2d 1250, 1254-55 (1978); *Pacifica Foundation (WPFW-FM)*, 95 FCC 2d 750 (1983).

[13] *See KPFK-FM*, 2 FCC Rcd at 2699 ¶ 12.

[14] *Id.* at 2699 ¶ 16, 2701 ¶ 25 & cases cited therein.

[15] *KPFK-FM* involved two complaints against the same licensee. While we found that the broadcast of certain portions of a program entitled "IMRU", which was the subject of one complaint, was actionable under Section 1464, we declined to find that a broadcast of another program, entitled "Shocktime, U.S.A.," was actionable. The complaint relating to the latter broadcast, which indicated that the broadcast consisted of unscripted, isolated expletives, did not present sufficient evidence for a finding of actionable indecency. *Id.* at 2700 ¶¶ 17-18.

[16] MDCD supports the position espoused by NAB.

[17] *FCC v. Pacifica Foundation*, 438 U.S. at 742.

[18] The public notice was not intended to have any independent legal significance but rather was issued simply to apprise all affected licensees of the change of enforcement standards that was reflected in our declaratory rulings. Thus, unlike the three rulings, the public notice is not a final action as to which reconsideration lies. *See* 47 C.F.R. § 1.106 (a)(1). Nonetheless, the three rulings could have an impact on all licensees (*see KPFK - FM*, 2 FCC Rcd at 2702 n.9; *KCSB - FM*, 2 FCC Rcd at 2704 n.11; *WYSP (FM)*, 2 FCC Rcd at 2707 n.15). Accordingly, to address uncertainty created by those rulings we treat the filings before us as requests for reconsideration of the three specific cases. *See* 5 U.S.C. § 554(e). The specific facts and circumstances of the three cases are key because the Commission was not attempting to set forth a blueprint as to all matter that would be considered indecent. Rather, as described below, all the Commission found was that the three specific programs before it -- or, more specifically, portions thereof -- were indecent. The fact that these conclusions were based on revised enforcement standards, which were announced through these decisions, does not change the fact that our rulings were confined to the specific factual settings of each case.

[19] *See* 18 U.S.C. § 1464; 47 U.S.C. §§ 312(a)(6), 503(b)(1)(D).

[20] *WBAI (FM)*, 56 FCC 2d at 98.

[21] *See FCC v. Pacifica Foundation*, 438 U.S. at 749-50; *id.* at 757-58 (Powell, J., concurring). *Cf. Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding New York state law prohibiting sale of offensive sexual material that is obscene as to children). In *Ginsberg*, the Court emphatically stated that "constitutional interpretation has consistently recognized that the parents claim to authority in their own household to direct the rearing of their children is basic in the structure of our society. *Id.* at 639. Our goal is to ensure that parents remain in a position to exercise this authority. We agree with the Court, however, that parental control cannot always be provided, particularly in this day of "walkman" radios and "watchman" televisions. As the Court explained in *Ginsberg* :

> While the supervision of children's reading may best be left to their parents, *the knowledge that parental control or guidance cannot always be provided and society's transcendent interest in protecting the welfare of children justify the reasonable regulation* of the sale of material to them.

[22] *Id.* at 640 (citation omitted, emphasis added). *Carlin Communications, Inc. v. FCC*, 749 F.2d 113, 121 (1984), *citing Ginsberg v. New* York, 390 U.S. 629 (1968).

[23] See FCC v. Pacifica Foundation, 438 U.S. at 757-61 (Powell, J., concurring); id. at 748-50.

[24] KPFK-FM, 2 FCC Rcd at 2699 ¶¶ 14-15 & cases cited therein. Cf. Butler v. Michigan, 352 U.S. 380 (1956) (the government, in an effort to protect children, may not impose overly broad restrictions that would reduce adults to reading only that which is fit for children). See also WBAI(FM), 56 FCC 2d at 103-04 (concurring statement of Comm'rs Robinson and Hooks) (Despite the fact that the statute (18 USC 1464) on its face expresses no limit on our power to forbid indecent' language over the air, the First Amendment does not permit us to read the statute broadly. Nor does a simple respect for the wise and salutary principle of governmental restraint in matters of public decorum.).

[25] Many of these same considerations persuade us likewise that we must decline the expansive reading MIM would have us place on the term "indecent" i.e., as including that which is "immodest," "unbecoming," "unfit to be seen or heard," and "more than indelicate and less than immodest." The Supreme Court's *Pacifica* decision did not give the Commission authority to regulate any programming that might be objectionable to some members of the audience. Rather, the Court only approved our application of a standard addressing material containing patently offensive references to sexual or excretory activities or organs.

[26] *See generally New York v. P.J. Video, Inc.*, 475 U.S. 868 (1986); *Smith v. United States*, 431 U.S. 291 (1977); *Ward v. Illinois*, 431 U.S. 767 (1977); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *United States v. Petrov*, 747 F.2d 824 (2d Cir. 1984), *cert denied, 471 U.S. 1025 (1985)*.

[27] Cf. United States v. Various Articles of Obscene Merchandise, 600 F.2d 394, 403-06 (2d Cir. 1979) (noting lack of precision in the term "patently offensive" as construed in obscenity cases).

[28] Contrary to what the April 29, 1987, Public Notice may have inadvertently suggested, consideration of context is critical in all indecency cases, regardless of whether the material in question involves innuendo, double entendre, or explicit references to sexual or excretory matters. As noted above, in light of the importance of context to the task at hand, we cannot list any particular language or material that will always be found indecent. Indecency, however, is a limited category of speech, and we would expect that the vast majority of programs broadcast will be unaffected by these three rulings.

[29] *FCC v. Pacifica Foundation*, 438 U.S. at 750.

[30] *See id.* at 747 (Stevens, J.); *id.* at 757 (Powell, J., concurring).

[31] As Justice Stevens noted in *Pacifica*, "[a] requirement that indecent language be avoided will have its primary effect on the form, rather than the content, of serious communications. There are few, if any, thoughts that cannot be expressed by the use of less offensive language." *Id.* at 743 n.18. As we did in 1976, when the Radio-Television News Directors Association made a similar request, we decline to rule on petitioners' request that we exempt all news broadcasts from indecency findings, because that issue is not directly presented by any of the cases before us. *See Citizen's Complaint Against Pacifica Foundation*, 59 FCC 2d 892 (1976). We repeat, however, that context will always be critical to an indecency determination and that the context of a *bona fide* news program will obviously be different from the contexts of the three broadcasts now before us, and, therefore, would probably be of less concern.

[32] *FCC v. Pacifica Foundation*, 438 U.S. at 750.

[33] *See generally id.* at 758-59 (Powell, J., concurring).

[34] *Id.* at 750 & n.29.

[35] We note, however, that even if we were to consider merit as a separate factor, for example if we were to apply a variable obscenity test, *see Ginsberg v. New York*, 390 U.S. 629 (1968), our determination in each of the three cases would be unaltered. Indeed, even if we were to consider prurient appeal as an additional, separate factor, our conclusions would not change. We conclude that the descriptions of sexual conduct in each of the three broadcasts described herein would appeal, in particular, to the prurient interest of children.

[36] We do not construe our *1975 WBAI(FM)* ruling as inconsistent with this notion. *WBAI(FM)*, 56 FCC 2d at 98. Rather, we interpret our prior ruling to mean that we would not permit merit to "save" programming that is nonetheless patently offensive. We likewise reject in our decisions today the notion that merit is a separate prong of the test for indecency.

[37] Excerpted portions of the broadcast appear in the Appendix to this decision.

[38] *WYSP(FM)*, 2 FCC Rcd at 2706 6 10. Excerpts of the broadcasts are reprinted in the Appendix.

[39] The lyrics are reprinted in the Appendix.

[40] 418 U.S. 87 (1974).

[41] *Id.* at 107.

[42] *Id.* at 104-05.

[43] *Cf. Taft Broadcasting Co.*, 16 RR 2d 507, 511 (1969) (although broadcaster violated lottery statute, staff-imposed sanctions rescinded because there were no prior decisions that would have enabled licensee reasonably to anticipate FCC's construction of 18 U.S.C. § 1304). *See generally* 47 U.S.C. § 503(b)(2) (in assessing a forfeiture, Commission directed to take all relevant circumstances into account).

[44] *See generally National Ass'n of Independent Television Producers and Distributors v. FCC*, 516 F.2d 526 (D.C.Cir. 1975), wherein the Court of Appeals observed that "[t]here is no reason for a licensee who is not out to cut corners to fear that severe sanctions will be imposed for good faith error." *Id.* at 450.

[45] Obviously, to the extent a broadcaster is "chilled" from airing indecent programs when there is a reasonable risk that children may be in the audience, that is not an "inappropriate chill." We emphasize, morever, that we do not define reasonable in the manner that NAB appears to urge -- that is, we do not adopt a policy under which a licensee's broadcast of patently offensive sexual or excretory references or depictions would be found reasonable, and hence not a violation of Section 1464, unless the licensee has notice beforehand in the form of explicit Commission precedent that the program is indecent.

Unquestionably, however, it would be *prima facie* unreasonable for any licensee to air material that has already been found indecent when there is a reasonable risk that children may be in the audience.

[46] Infinity Broadcasting noted, for instance, that its employment contract with Mr. Stern expressly precludes his use of the seven words at issue in the 1975 *Pacifica* case during his broadcast program.

[47] Petitioners have asked that we establish some hour, specifically 10:00 m., after which certain non-obscene, adult oriented programming may be aired. We note, first, that the Commission's holding in adjudicatory matters can resolve only the issues before it. In two of these proceedings, we have found that there remains a reasonable risk that children may be in the audience at 10:00 p.m. and, therefore, that 10:00 p.m. can no longer be considered the hour after which indecent programming may be aired. Nonetheless, we will avail ourselves of this opportunity to express more generally our current intention with respect to this issue based upon information currently available to the Commission.

Although we remain convinced that a determination in individual cases based on relevant data is theoretically the most desirable means of determining when there is no longer a reasonable risk that children may be in the audience, we are constrained to agree with petitioners that the effect of that approach may well be to cause broadcasters to forego the broadcast of certain protected speech altogether, rather than to channel it to late night hours. The result -- an effective ban -- would be contrary to current law that indecent but not obscene material can be restricted but not banned. See FCC v. Pacifica Foundation, 438 U.S. at 757-61 (Powell, J., concurring); id. at 748-50.

Therefore, whereas previously we indicated that 10:00 p.m. was a reasonable delineation point, we now indicate that 12:00 midnight is our current thinking as to when it is reasonable to expect that it is late enough to ensure that the risk of children in the audience is minimized and to rely on parents to exercise increased supervision over whatever children remain in the viewing and listening audience. Indeed, parents will be on notice that their supervision of any children still awake must be increased after midnight. This approach, we believe, accommodates the competing interests of (1) the government, which has a compelling interest in protecting children from indecent material; (2) parents, who are entitled to decide whether their children are exposed to such material if it is aired; (3) broadcasters, who are

entitled to air such material at times of day when there is not a reasonable risk that children may be in the audience; and (4) adult listeners, who have a right to see and hear programming that is inappropriate for children but not obscene. We emphasize, however, that obscene programming is not protected by the first amendment and that, under Section 1464, it is prohibited from being broadcast at any time of the day or night.

[48] Obviously, in cases where we do not impose a sanction, as here, the conduct at issue cannot be a basis for adverse action at renewal time.

[49] To conserve our resources, we will ordinarily require complaining parties to provide a tape, transcript or significant excerpts of programming, together with the date and time of the subject broadcasts, and the call letters of or other identifying information about the broadcast station and licensee. In this way, we will have a sufficient basis for identifying prima facie violations of the statute before requiring broadcasters to respond to complaints. In addition, to facilitate prompt determinations, complaints should be lodged as soon as possible after a broadcast, as in the cases before us; they should not be withheld until renewal time.

CONCURRING STATEMENT OF COMMISSIONER PATRICIA DIAZ DENNIS

I agree with the majority that the programs at issue in these three cases are indecent. Broadcast of the programs violated Section 1464 of Title 18 of the United States Code.

I write separately because the majority decision fails to state a satisfactory reason for not issuing a rule to inform broadcasters when they may channel the broadcast of indecent, non-obscene programs. Footnote 47 begins: "Petitioners have asked that we establish some hour, specifically 10:00 p.m., after which certain non-obscene, adult oriented programming may be aired." The majority appropriately states that "the Commission's holding in adjudicatory matters can resolve only the issues before it." Because of the holding implicit in two of these cases, the majority points out, "10:00 p.m. can no longer be considered the hour after which indecent programming may be aired." But this is no answer.

If we were not taking a position on the petitioners request to establish some hour in these proceedings, we should have proposed a rulemaking. We could have taken official notice that the broadcasting industry and, indeed, the public generally, took an active interest in these adjudicatory matters. The Commission's action on these petitions, as important as it is to the parties, is of even greater interest because of what it says about our policy on the regulation of indecent speech. At stake are important Constitutional issues and equally important societal values. Indecent speech is protected by the First Amendment. On the other hand, the compelling government interest in protecting the welfare of children obligates us to channel the time, place, and manner of indecent speech so there is no reasonable risk that children may be in the audience. Yet, to avoid chilling broadcasters speech by subjecting them to a vague or overbroad standard, we must be as specific as possible in describing how such speech should be channelled. The least we could have done was to establish a time certain after which indecent material may be channelled.

This the majority does not do. After stating why an adjudicatory matter is not the vehicle for defining the critical hour after which indecent material may be broadcast, they discuss the merits of adopting a 12:00 midnight hour. However, not only is this dicta, it is neither decisive nor clear. Footnote 47 refers to the majority's expression of its' current intention ... based upon information currently available to the Commission and its "current thinking." The reader is left to wonder what "information currently" the Commission has. How exactly this information factored into the majority's "current thinking" is unexplained. Nothing informs the broad casters or parents of children what to expect from a fully informed Commission or what to present to the Commission so that we will be so informed.

Moreover, the arguments the majority gives in support of midnight as the critical hour may well be equally true if applied to an earlier hour. Footnote 47 states that it is reasonable to expect that, by midnight adults will generally be present and able to monitor the listening and viewing habits of the children in their homes. Based on "information currently available to the Commission" (or, at least, to this Commissioner), this is equally true at 11:00 p.m. The fact is the Commission has no scientific body of information that conclusively establishes one time as more appropriate than another as the critical hour after which to permit broadcast of indecent speech. What is necessary is a notice of proposed rulemaking to establish a record. Even then, picking the right hour will be a judgment call. The Commission will have to evaluate and weigh the competing interests which the majority recognize: the government interest in protecting children from indecent material; the interest of parents to decide whether their children are exposed to such material; the broadcasters interest in airing such material in an appropriate time, place and manner; and the interest of adults in seeing and hearing programs inappropriate for children, but not obscene.

I would propose a Commission rule establishing the end of prime time as the appropriate time. In making this proposal, I am mindful of the Supreme Court's decision in *Butler v. Michigan* , 352 U.S. 380 (1956). Time, place and manner restrictions imposed to advance the government and societal interests in protecting the welfare of children under the *Butler* analysis cannot reduce adult programming to the level of what is fit only for children. Because the broadcasting industry and the public uniformly recognize prime time as the time of heaviest viewing, I believe that post-prime time (after 11:00 p.m. or 10:00 in certain areas of the country) is a more appropriate time to channel indecent programming. Yet, such channelling still affords adults reasonable access to such material.

Although the available data do not point to any one time, we are not wholly without guideposts in picking the critical hour. We know that the incidence of children in the broadcast audience decreases progressively in the late evening hours. Available nationwide data on radio listening habits [1] for Monday-Friday show that the teen audience (ages 11-17) peaks at 10:00 p.m. then drops down to approximately the 9:00 p.m. listening level, [2] and drops dramatically from 11:00 p.m. to midnight.[3] The December 1986 Nielsen Service Survey for prime time viewing habits also demonstrates a significant decline in post-prime-time viewing by children and teens. The survey shows that while 31-34% of the total television time viewed by teens (12-17) was during prime-time hours[4], only 5-6% of their

viewing occurred during the initial two post-prime-time hours (11:00 p.m.-1:00 a.m.). Children aged 6-11 spent 28% of their total television viewing time during prime time hours, and only 2% during the first two hours of post-prime time. Eighteen percent of the viewing time of children aged 2-5 occurred during prime-time hours, also dropping to 2% post-prime time.

Prime time is the traditionally acknowledged time of heavy viewership. Because Nielsen data show a significant decrease in teen and child viewing during post-prime-time hours, it seems reasonable to channel indecent programming to post-prime time. Nielsen data show that 9-12% of the total viewing time of the adult males surveyed and 8-10% of the viewing time of adult females occurred post-prime time. This demonstrates that adults *do* remain in the audience post-prime time. Channelling indecent programming to those hours should still provide reasonable access to adult viewers.

Admittedly, the foregoing statistics are not the most precise for our purposes, nor are conclusions readily drawn from them. Were we to issue an NPRM, I would hope commenters could supply better statistics; statisticians could then comment on the statistical significance of all the data.

In the meantime, based upon the data above and my balancing of the competing interests, considering particularly the Court's instructions in *Butler*, I would propose to channel indecent speech to post-prime-time hours on Sunday through Thursday nights. I agree with the majority that indecent speech should be channelled after 12:00 midnight on Friday and Saturday nights. Both children and adults may well stay up later on those nights. Thus, channelling indecent programs to a slightly later hour on non-school nights promotes the government interest in protecting children while still providing reasonable access to such programming for adults.

FOOTNOTES FOR STATEMENT

[1] Radar 33, Radio Usage, Spring 1986 Report at 6-9.

[2] From 10:00-11:00 p.m. the data show a decrease of approximately 500,000 listeners, or 14% of the 10:00 p.m. listening level.

[3] From 11:00-12:00 midnight the teen listening level decreases by approximately 1,200,000 listeners, or one-third of the 10:00 p.m. listening level.

[4] Prime time in this survey was 8:00-11:00 p.m. Monday-Saturday; 7:00- 11:00 p.m. Sunday.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY — File No. I-T-C-88-024

For Authority Pursuant to Section 214 of the Communications Act of 1934, as Amended, to Conform the Assignment of Capacity in the HAW-4/TPC-3 Cable System, as Previously Authorized, to the Assignment of Capacity Agreed to by the HAW-4/TPC-3 Owners in Amendatory Agreement No. 1, Signed October 2, 1987, to the Construction and Maintenance Agreement

ORDER AND AUTHORIZATION

Adopted: February 11, 1988; Released: February 22, 1988

By the Acting Chief, International Facilities Division:

1. The Commission has under consideration an application filed by the American Telephone and Telegraph Company (AT&T) requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to conform the assignment of capacity in the Hawaii-4/Transpacific-3 (HAW-4/TPC-3) high capacity digital submarine cable system as previously authorized to the assignment of capacity agreed to by the HAW-4/TPC-3 owners in Amendatory Agreement No. 1 signed October 2, 1987. The Amendatory Agreement No. 1 amends the Construction and Maintenance Agreement (C&MA) signed on January 22, 1986. No comments were received in response to the application.

2. On September 4, 1985, the HAW-4/TPC-3 joint applicants filed an application pursuant to Section 214 of the Communications Act requesting authority to construct and acquire capacity in the HAW-4/TPC-3 and Guam-Philippines-2 (GP-2) Cable Systems. In that application, the HAW-4/TPC-3 joint applicants indicated that the assignments of capacity in the Cable Systems, as reflected in the initialed HAW-4/TPC-3 C&MA, would be revised before the C&MA was signed to reflect the final assignment of Minimum Assignable Units of Ownership (MAUOs) agreed to by the parties. Following the grant of the HAW-4/TPC-3 and GP-2 Section 214 application on December 17, 1985,[1] AT&T states that the parties to the C&MAs agreed to some minor revisions in their capacity assignments to better reflect their projected service requirements. According to AT&T, the revised capacity assignments agreed to by the parties were incorporated in the C&MAs signed by the parties on January 22, 1986, and authorized by the Commission on September 19, 1986.[2] In this application, AT&T requests that the authorization to acquire capacity in the HAW-4/TPC-3 Cable System as reflected in the C&MAs signed January 22, 1986 be further revised to conform to the Amendatory Agreement No. 1 as signed by the parties on October 2, 1987. AT&T states that a comparison of the capacity assignments, as previously authorized, and those in the revised Schedules shows that there is no material change in the basis for the HAW-4/TPC-3 owners' initial Section 214 application and subsequent grants of authority. As a matter of cooperation with the HAW-4/TPC-3 owners, AT&T states that it has agreed, subject to authorization by this Commission, to revise its assignments of capacity in the HAW-4/TPC-3 Cable System in accordance with the revisions desired and agreed to by such owners.[3]

3. After consideration of AT&T's request, we find that grant of the instant application will serve the public interest. AT&T's request is based on the consent of HAW-4/TPC-3 joint owners. Also, there is no material change in the basis for the capacity assigned under the Amendatory Agreement No. 1 and the capacity assigned in previous authorizations.

4. Accordingly, IT IS ORDERED, that application File No. I-T-C-88-024 of the American Telephone and Telegraph Company IS GRANTED and AT&T is authorized to conform the assignment of capacity in the HAW-4/TPC-3 Cable System to the assignment of capacity agreed upon in Amendatory Agreement No. 1 and as summarized in Schedule D appended hereto.

5. This order is issued under Section 0.291 of the Commission's rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Acting Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] American Telephone and Telegraph Co., *et al.*, File No. I-T-C-85-219, released January 7, 1986.

[2] American Telephone and Telegraph Co., *et al.*, File No. I-T-C-86-112, released September 19, 1986.

[3] AT&T states that the remaining HAW-4/TPC-3 joint applicants, as "non-dominant carriers", are not required to obtain authorization from the Commission in order to revise their assignments.

ASSIGNMENT OF MINIMUM ASSIGNABLE UNITS OF OWNERSHIP (MAUOS) IN THE HAW-4/TPC-3 CABLE SYSTEM

SEGMENT B

MAUOS ASSIGNED FOR JOINT USE

PARTIES	OTC	KDD	KTA	NZPO	CAPUIRE	ETPI	GNCR	PHILCOM	PLDT	ITDC	DBP	BT PLC	RCA GLOBCOM	
DBP	0	69	18	0	0	1	0	0	12	30	0	0	0	
BT PLC	0	180	0	0	0	0	0	0	0	0	0	0	0	
AT&T	81	2011	573	28	0	0	0	0	720	544	27	297	30	
FTCC	5	39	0	0	0	0	0	0	0	0	0	0	0	
US SPRINT	20	90	0	0	0	0	0	0	0	30	0	0	0	
OTC	0	0	0	0	0	0	0	0	0	0	13	0	0	
ITT WORLDCOM	17	60	2	2	0	0	7	0	0	4	1	1	0	
MCII	7	117	4	2	0	4	0	0	0	4	1	1	0	
RCA GLOBCOM	14	47	2	4	0	0	0	9	0	2	1	1	0	
TRT	2	0	4	1	2	0	0	0	0	0	0	0	0	
MUTCD	12	0	3	3	1	3	0	2	0	4	0	0	0	
SUBTOTAL														5180

MAUOS ASSIGNED FOR SOLE USE

PARTIES	
AT&T	1799
FTCC	5
US SPRINT	120
OTC	17
ITT WORLDCOM	107
MCII	273
RCA GLOBCOM	42
TRT	11
MUTCD	6
SUBTOTAL	2380
TOTAL	7560

SUMMARY

PARTIES	JOINTLY ASSIGNED	SOLELY ASSIGNED	MAUO 1/2 INTERESTS
OTC	158	0	158
DBP	173	0	173
KDD	2629	0	2629
KTA	688	0	688
NZPO	68	0	68
CAPUIRE	3	0	3
ETPI	10	0	10
GNCR	7	0	7
PHILCOM	11	0	11
PLDT	732	0	732
ITDC	618	0	618
BT PLC	480	0	480
AT&T	4311	1799	7909
FTCC	35	5	45
US SPRINT	340	120	580
OTC	13	17	47
ITT WORLDCOM	94	107	308
MCII	344	273	890
RCA GLOBCOM	110	42	194
TRT	17	11	39
MUTCD	36	6	48
			19120

ASSIGNMENT OF MINIMUM ASSIGNABLE UNITS OF OWNERSHIP (UNITS)
IN THE RMH-4/TPC-3 CABLE SYSTEM

SUBSEQUENT B1

BANDS ASSIGNED FOR JOINT USE

PARTIES	RMH	CAPWIRE	ETPI	GNCR	PHILCOM	PLDT	STDC	AXES	BCA GLOBCOM	
TELEGLOBE	0	0	1	0	0	10	12	1	0	
DBP	0	0	1	0	0	12	30	0	0	
RMH	0	0	0	0	0	0	1	0	0	
BT PLC	90	0	0	0	0	0	0	270	0	
AT&T	100	0	0	0	0	720	544	0	30	
US SPRINT	90	0	0	0	0	0	30	0	0	
STC	0	0	0	0	0	14	10	0	4	
ITT WORLDCOM	0	0	0	10	0	0	4	0	0	
MCII	0	0	0	0	0	0	4	0	0	
BCA GLOBCOM	0	0	0	0	11	0	2	0	0	
TRT	0	2	0	0	0	0	0	0	0	
UNYCO	0	1	3	0	2	0	4	0	0	
SUBTOTAL										2851

BANDS ASSIGNED FOR SOLE USE

PARTIES	
AT&T	1574
US SPRINT	60
STC	37
ITT WORLDCOM	7
MCII	48
BCA GLOBCOM	31
SUBTOTAL	1769
TOTAL	3780

SUMMARY

PARTIES	JOINTLY ASSIGNED	SOLELY ASSIGNED	RMH 1/2 INTERESTS
TELEGLOBE	32	0	32
DBP	43	0	43
RMH	280	0	280
BZPD	1	0	1
CAPWIRE	3	0	3
ETPI	13	0	13
GNCR	10	0	10
PHILCOM	13	0	13
PLDT	764	0	764
STDC	641	0	641
BT PLC	360	0	360
AT&T	1665	1574	4813
US SPRINT	120	60	240
STC	30	37	104
ITT WORLDCOM	14	7	28
MCII	12	48	92
BCA GLOBCOM	49	31	111
TRT	2	0	2
UNYCO	10	0	10
			7560

ASSIGNMENT OF MINIMUM ASSIGNABLE UNITS OF OWNERSHIP (MAUS)
IN THE HAW-4/TPC-3 CABLE SYSTEM

SUBSEGMENT B1

MAUS ASSIGNED FOR JOINT USE

PARTIES	KDD	KTA
OTC	44	0
TELEGLOBE	99	6
DBP	99	18
NZPO	2	1
BT PLC	120	0
AT&T	2337	573
FTCC	35	0
MTC	78	12
ITT WORLDCOM	94	2
MCII	153	6
RCA GLOBCOM	63	2
TBT	12	4
WUTCO	15	3
SUBTOTAL		3700

MAUS ASSIGNED FOR SOLE USE

NONE

SUBTOTAL	0
TOTAL	3700

SUMMARY

PARTIES	JOINTLY ASSIGNED	SOLELY ASSIGNED	MAUS 1/2 INTERESTS
OTC	44	0	44
TELEGLOBE	105	0	105
DBP	117	0	117
KDD	3153	0	3153
KTA	427	0	427
NZPO	3	0	3
BT PLC	120	0	120
AT&T	2910	0	2910
FTCC	35	0	35
MTC	90	0	90
ITT WORLDCOM	96	0	96
MCII	159	0	159
RCA GLOBCOM	65	0	65
TBT	16	0	16
WUTCO	18	0	18
			7560

ASSIGNMENT OF MINIMUM ASSIGNABLE UNITS OF OWNERSHIP (MAUOS)
IN THE HAW-4/JPC-3 CABLE SYSTEM

SUBSEGMENT 02

MAUOS ASSIGNED FOR JOINT USE

PARTIES	KDD	KTA	
OTC	46	0	
TELEGLOBE	99	6	
DDP	99	18	
NZPO	2	1	
BT PLC	120	0	
AT&T	2337	573	
FTCC	35	0	
ITC	78	12	
ITT WORLDCOM	94	2	
MCII	153	6	
RCA GLOBCOM	63	2	
TRT	12	4	
WATCO	15	3	
SUBTOTAL			3780

MAUOS ASSIGNED FOR SOLE USE

NONE

SUBTOTAL	0
TOTAL	3780

DOMAIN

PARTIES	JOINTLY ASSIGNED	SOLELY ASSIGNED	HAWD 1/2 INTERESTS
OTC	46	0	46
TELEGLOBE	105	0	105
DDP	117	0	117
KDD	3153	0	3153
KTA	627	0	627
NZPO	3	0	3
BT PLC	120	0	120
AT&T	2910	0	2910
FTCC	35	0	35
ITC	90	0	90
ITT WORLDCOM	96	0	96
MCII	159	0	159
RCA GLOBCOM	65	0	65
TRT	16	0	16
WATCO	18	0	18
			7560

ASSIGNMENT OF MINIMUM ASSIGNABLE UNITS OF OWNERSHIP (MAMOS)
IN THE GUAM-4/TPC-3 CABLE SYSTEM

SUBSEGMENT B2

MAMOS ASSIGNED FOR JOINT USE

PARTIES	MDD	KTA
ETPI	2	0
GNCR	5	0
PHILCOM	84	6
STDC	0	2
BT PLC	240	0
AT&T	3809	0
US SPRINT	120	0
RTC	60	0
ITT WORLDCOM	33	0
NCII	25	0
RCA GLOBCOM	93	1
TRT	3	0
WUTCO	17	0
SUBTOTAL		3700

MAMOS ASSIGNED FOR SOLE USE

NONE

SUBTOTAL	0
TOTAL	3700

SUBUNIT

PARTIES	JOINTLY ASSIGNED	SOLELY ASSIGNED	MAMO 1/2 INTERESTS
MDD	3771	0	3771
KTA	9	0	9
ETPI	2	0	2
GNCR	5	0	5
PHILCOM	90	0	90
STDC	2	0	2
BT PLC	240	0	240
AT&T	3809	0	3809
US SPRINT	120	0	120
RTC	60	0	60
ITT WORLDCOM	33	0	33
NCII	25	0	25
RCA GLOBCOM	94	0	94
TRT	3	0	3
WUTCO	17	0	17
			7540

ASSIGNMENT OF MINIMUM ASSIGNABLE UNITS OF OWNERSHIP (MAUOS) IN THE HAW-4/TPC-3 CABLE SYSTEM

SUBSEGMENT 03

MAUOS ASSIGNED FOR JOINT USE

PARTIES	KDD	CAPWIRE	ETPI	GNCR	PHILCOM	PLDT	ITDC	AT&T	RCA GLOBCOM	
TELEGLOBE	0	0	1	0	0	18	12	1	0	
DNP	0	0	1	0	0	12	38	0	0	
KDD	0	0	0	0	0	0	1	0	0	
BT PLC	90	0	0	0	0	0	0	270	0	
AT&T	100	0	0	0	0	720	544	0	38	
US SPRINT	90	0	0	0	0	0	30	0	0	
BTC	0	0	0	0	0	14	10	0	4	
ITT WORLDCOM	0	0	0	10	0	0	4	0	0	
MCII	0	0	0	0	0	0	4	0	0	
RCA GLOBCOM	0	0	0	0	11	0	2	0	0	
TRT	0	2	0	0	0	0	0	0	0	
WATCO	0	1	3	0	2	0	4	0	0	
SUBTOTAL										2031

MAUOS ASSIGNED FOR SOLE USE

PARTIES	
AT&T	1574
US SPRINT	60
BTC	37
ITT WORLDCOM	7
MCII	48
RCA GLOBCOM	31
SUBTOTAL	1749
TOTAL	3780

SUMMARY

PARTIES	JOINTLY ASSIGNED	SOLELY ASSIGNED	MAUO 1/2 INTERESTS
TELEGLOBE	32	0	32
DNP	63	0	63
KDD	280	0	280
KDPO	1	0	1
CAPWIRE	3	0	3
ETPI	13	0	13
GNCR	10	0	10
PHILCOM	13	0	13
PLDT	764	0	764
ITDC	641	0	641
BT PLC	360	0	360
AT&T	1665	1574	4813
US SPRINT	120	60	240
BTC	30	37	104
ITT WORLDCOM	14	7	28
MCII	12	48	92
RCA GLOBCOM	49	31	111
TRT	2	0	2
WATCO	10	0	10
			7560

ASSIGNMENT OF MINIMUM ASSIGNABLE UNITS OF OWNERSHIP (MAUOS)
IN THE RAM-4/TPC-3 CABLE SYSTEM

SUBSEGMENT B3

MAUOS ASSIGNED FOR JOINT USE

PARTIES	KDD	KTA
ETPI	2	0
GNCR	5	0
PHILCOM	84	4
IIDC	0	2
BT PLC	240	0
AT&T	3089	0
US SPRINT	120	0
RTC	60	0
ITT WORLDCOM	33	0
MCII	25	0
RCA GLOBCOM	93	1
TRT	3	0
UATCO	17	0
SUBTOTAL		3780

MAUOS ASSIGNED FOR SOLE USE

NONE	
SUBTOTAL	0
TOTAL	3780

SUMMARY

PARTIES	JOINTLY ASSIGNED	SOLELY ASSIGNED	MAUO 1/2 INTEREST
KDD	3771	0	3771
KTA	9	0	9
ETPI	2	0	2
GNCR	5	0	5
PHILCOM	90	0	90
IIDC	2	0	2
BT PLC	240	0	240
AT&T	3089	0	3089
US SPRINT	120	0	120
RTC	60	0	60
ITT WORLDCOM	33	0	33
MCII	25	0	25
RCA GLOBCOM	94	0	94
TRT	3	0	3
UATCO	17	0	17
			7540

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